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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. [redacted] 467

PETER OMICINI,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

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Petitioner prays that a Writ of Certiorari issue to review the order of the California Supreme Court denying Petition for Habeas Corpus, entered in the above entitled case on March 30, 1966.

OPINIONS AND/OR JUDGMENTS BELOW

There are no reported opinions in this case. The judgment of the Municipal Court in and for the Eureka Judicial District, Humboldt County, State of California, was entered in the criminal action entitled The People of the State of California v. Peter Omicini on May 25, 1965. (Appendix A, infra, p. 17.) The order of the Appellate Division of the Superior Court in and for the County of Humboldt, State of California, affirming the judgment of the Municipal Court was entered on October 27, 1965. (Appendix A, infra, p. 24.) The order of the Appellate Division of said Superior Court denying application for certification of the case to the First District Court of Appeal, State of California, was entered on January 4, 1966. (Appendix A, infra, p. 27.) The order of said First District Court of Appeal denying petition for habeas corpus was entered on January 31, 1966. (Appendix A, infra, p. 28.) The order of the California Supreme Court denying petition for habeas corpus was entered on March 30, 1966. (Appendix A, infra, p. 28; 64 A.C., Minutes, p. 2, Crim. No. 9830.)

JURISDICTION

The order of the California Supreme Court was entered on March 30, 1966. (64 A.C., Minutes, p. 2, Crim. No. 9830; Appendix A, infra, p. 28.) On June 17, 1966, the Honorable Earl Warren, Chief Justice of the United States Supreme Court, ordered the time for filing a petition for writ of certiorari in this cause extended to and including July 28, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), since the validity of a State statute on grounds of repugnancy to the United States Constitution is drawn into question.

QUESTIONS PRESENTED

1. Whether Section 148 of the Penal Code of the State of California is an unconstitutional statute per se in violation of due process of law under the Fourteenth Amendment to the United States Constitution because of vagueness.

2. Whether, assuming Section 148 of the Penal Code of the State of California is constitutional per se, the conviction of petitioner of a violation of said section under the evidence presented in this case was in violation of the due process clause of the Fourteenth Amendment.

3. Whether due process of law as required by the Fourteenth Amendment was violated when evidence was admitted of admissions and incriminating statements made by petitioner after his arrest in the absence of counsel and without information or advice having been given to petitioner of his right to remain silent and to have advice of counsel.

4. Whether the failure of the trial court to instruct the jury on all the elements necessary to prove the offense resulted in conviction of petitioner in violation of the due process clause of the Fourteenth Amendment.

5. Whether the refusal of the trial court to order a new trial in the face of newly discovered evidence resulted in a violation of due process of law under the Fourteenth Amendment.

6. Whether the California statutes and rules of Court prohibiting the taking of appeals from the Municipal Courts in criminal cases to the highest State Court but permitting such appeals from the Superior Courts, are in violation of the due process and equal protection of the laws clauses of the Fourteenth Amendment.

STATUTES INVOLVED

The following statutes and rules of court are set forth in Appendix B, infra, pp. 29-39:

1. Section 148 of the California Penal Code.

2. Section 4e of Article VI, California Constitution.

3. Section 1471 of the California Penal Code.

4. Rules 61 to 69, inclusive, of the California Rules of Court.

STATEMENT OF THE CASE

On December 3, 1964, petitioner was charged by a complaint of officers of the California Highway Patrol with a violation of Section 148 of the California Penal Code. This section reads as follows:

> "Every person who wilfully resists, delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

On or about May 6, 1965 to May 11, 1965 petitioner was tried by jury. The evidence against petitioner consisted primarily of the testimony of two officers of the California Highway Patrol, Officers Leach and Williams. These officers had stopped a motorist in a pick-up truck on a city street in Eureka just adjacent to a parking lot adjoining a bowling alley. The purpose of the officers was to warn the motorist about what they considered to be an unsafe manner in which he had changed from one traffic lane to another. When the pick-up truck stopped, Officer Leach got out of the patrol car and talked to the driver, while Officer Williams, who was driving the patrol car, stayed inside. While waiting for Officer Leach to talk to the driver of the pick-up truck, Officer Williams observed petitioner walking from the bowling alley parking lot toward the patrol car. Petitioner stopped about six or seven feet from the patrol car and stood there watching.

Officer Williams got out of the patrol car and walked over to petitioner and asked petitioner if he needed help. The facts hereinafter set forth was the testimony of Officers Leach and Williams and was controverted by the testimony of petitioner. Petitioner told Officer Williams that the Highway Patrol should not patrol the area and should not make arrests in that area within Eureka. Petitioner then commenced to swear at Officer Williams, using various invectives, and the officer turned away and returned to the patrol car. Officer Leach had at this point also returned to the patrol car, after dismissing the pickup truck, and was seated on the passenger side of the front seat. Petitioner came up to the patrol car and attempted to talk further with the two officers from outside the passenger side of the patrol car. The window on that side was partially open. Officer Williams commenced to move the car forward but petitioner had placed his hands on the window, and Officer Williams decided to allow the car to remain stationary. At this point petitioner, continuing to address the officers, put his hands on the front of the jacket of Officer Leach. Officer Leach opened the car door, stepped out, and told petitioner he was under arrest. Officer Williams left the car from the driver's side and came around to the other side, whereupon the two officers pushed petitioner into the back seat of the patrol car and took him to jail.

Petitioner was found guilty by the jury of violation of Section 148 of the California Penal Code.

The federal questions sought to be reviewed by this honorable Court were raised according to the procedure provided by California law. On May 21, 1965 petitioner filed with the Municipal Court a motion for new trial. (Appendix C, infra, p. 41). This motion and the amendment thereto raised federal questions of violation of due process of law by the use of incriminating statements of petitioner at the trial, and failure to instruct the jury as to the law of the case. Following denial of the motion for new trial, the steps required by California law for review of judgments of Municipal Courts were taken and constitutional issues were raised in the following manner:

1. On June 1, 1965 petitioner filed a notice of appeal to the Appellate Division of the Superior Court of the State of California in and for the County of Humboldt. (Appendix D, infra, p. 49.) Judgment of the Municipal Court was affirmed.

2. On November 4, 1965 petitioner filed in the Appellate Division of the Superior Court an application for certification of the case to the District Court of Appeal. (Appendix E, infra, p. 50.) Certification was denied. This exhausted petitioner's appellate remedies for reviewing a judgment of a Municipal Court under California law by the appeal process.

3. On January 26, 1966 petitioner filed a petition for writ of habeas corpus in the District Court of Appeal for the First Appellate District of California. (Appendix F, infra, p. 52.) This raised the consti-

tutional issues stated hereinabove in this petition under the heading "Questions", except for number 6. The petition was denied by order without a hearing or opinion.

4. On February 18, 1966 petitioner filed a petition for writ of habeas corpus in the California Supreme Court. (Appendix G, infra, p. 77.) This raised the constitutional issues stated hereinabove in this petition under the heading "Questions", except for number 6. The petition was denied by order without a hearing or opinion.

The foregoing procedures exhausted all remedies under California law, by appeal and writ. Because of the fact that the Municipal Court judgment was affirmed without opinion and the applications for writs were denied without opinion, it is therefore necessary for petitioner to address this petition for writ of certiorari to the Municipal Court in and for the Eureka Judicial District. That is the court from which the record can be certified and is the court whose judgment petitioner seeks to have reviewed and reversed. (See *Department of Banking v. Pink,* 317 U.S. 264, 267; *Atherton v. Fowler,* 91 U.S. 143, 146-148.)

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case for the reasons stated below as to each question presented hereinabove.

Question No. 1. (Constitutionality of Section 148 per se.)

Section 148 of the California Penal Code is unconstitutional because it violates the well-established principle that a criminal statute must be plain and explicit, clearly informing men of common intelligence what acts are forbidden. A statute which forbids the doing of some act in terms so vague that men of common intelligence must necessarily be uncertain as to its meaning and differ as to its application violates the first essential of due process of law. (*Connally v. General Construction Co.*, 269 U.S. 385; *Yu Cong Eng v. Trinidad*, 271 U.S. 500.) A decision of this Court on the constitutionality of Section 148 is of great importance for the reason that the case does not affect only the petitioner, but also affects the rights of a great many other persons who are arrested each year for acts allegedly falling within the vague language of Section 148. The fact that a conviction was obtained on the evidence of the acts done in this case shows that the statute is applied by the courts to acts which constitute mere annoyance to police officers.

Question No. 2. (Constitutionality of application of Section 148 to this case.)

Even if it should be determined that Section 148 is not unconstitutionally vague per se, the judgment in this case applying the section to the facts should be reviewed by this Court. Such cases as *Thompson v. City of Louisville*, 362 U.S. 199 and *Garner v. Louisiana*, 368 U.S. 157, make it plain that this Court will review cases in which the evidence presented at the trial falls so far short of indicating violation of a penal statute that the conviction of the accused violates due process of law as to the single individual involved. In *Thompson*, supra, this Court stated that merely arguing with a policeman could not be "disorderly conduct" within the meaning of a city ordinance. In the instant case, petitioner's actions were inherently harmless and not extraordinary in light of the circumstances. Defendant was merely attempting to complete a conversation, albeit heatedly, with the patrol officers. The evidence is not sufficient to show (a) wilfullness, (b) resistance, delay or obstruction, or (c) that the officers were then engaged in discharging or attempting to discharge an official duty of their office. (See Reporter's Transcript, p. 71, lines 4-22.) All of these things are required to be proved by the evidence in order to sustain a conviction.

Question No. 3. (Admission of incriminating statements.)

The following references to the record of the trial demonstrate the incriminatory statements which were admitted into evidence and which were offered as grounds of appeal below:

Officer Williams testified that petitioner had said after his arrest and during the booking procedure at the jail: "I'm as drunk as can be." (Rptr. Tr., p. 45, line 12; p. 49, lines 20-25.)

Officer Leach testified as follows:

> "Q. Officer did you at any time when you were arresting Mr. Omicini, advise him of his rights as a man under arrest?
>
> A. No, sir, I did not.

> Q. Did you at any time advise him of his right to remain silent and say nothing?
>
> A. No, sir, I did not. . . . It was not until approximately thirty days later that we got the Dorado decision, which stated that in a felony case that the defendant had a right to counsel to be present at the time of questioning by a police officer." (Rep. Tr., p. 97, lines 1-6 and lines 18-21.)

Mr. Brewster, a lab technician, also testified that petitioner said, "I'm drunk as can be", at another point in the questioning by police during the booking procedure. (Rep. Tr., p. 200, lines 2-6.)

All witnesses for the prosecution failed to testify that petitioner had been advised of his right to remain silent and of his right to have an attorney present. All witnesses for the prosecution testified that petitioner used vile and profane language subsequent to his arrest.

The case of *Escobedo v. Illinois,* 378 U.S. 478, is applicable to this case as indicated by the recent decisions of this Court in the series of cases decided on this subject on June 13, 1966 and June 20, 1966. *(Miranda v. Arizona,* Nos. 759, 760, 761 and 584, reported at 43 L.W. 4521 and 4592.) Certainly statements of vile and profane language and admissions of being drunk offered by the prosecution would prejudice the petitioner in the eyes of the jury.

Question No. 4. (Erroneous jury instructions.)

The petitioner submitted the following jury instruction, which was refused by the trial judge:

> "The court instructs the jury that it is mandatory that the prosecution must prove every element of the following statute:
>
> 'Every person who wilfully resists, delays, or obstructs any public officer in the discharge or attempt to discharge any duty of his office. . . .' " (P.C. Sec. 148.)

The trial court refused to instruct the jury in any manner pertaining to the elements of Section 148 of the California Penal Code and specifically refused to instruct the jury as above requested. In the present case, evidentiary proof of all the elements of Section 148 was necessary. Because of the importance of the element of whether or not the officers were discharging or attempting to discharge some particular "official duty" at the time of petitioner's alleged resistance, delay or obstruction, it was necessary as a matter of due process of law that the trial court instruct the jury as set forth above, or at least as to proof of all of the elements being required for conviction.

The *Garner* case, supra, creates a constitutional requirement that vague statutes, if to be upheld at all, must be given a reasonable application consistent with due process. The term wilfullness appears in Penal Code Section 148. Was the act of the defendant "wilfull", or did the defendant "foreseeably" resist, delay or obstruct? It appears that the jury must be instructed on this requirement in order to comply with due process in light of the *Garner* case, supra.

Question No. 5. (Failure to order a new trial.)

Petitioner's motion for a new trial was based in part on the ground of newly discovered evidence. This consisted of evidence based on information and belief discovered subsequent to the trial showing that police officers in the area had been alerted to a person bearing a remarkable resemblance to petitioner who had a short time before been arrested and pleaded guilty to drunken driving. Said person had directed vile and abusive language at the arresting officers at the time of his arrest and had acquired the reputation with the police as a troublemaker. (See Exhibit C, infra, p. 47.) Affidavits were filed with the motion for new trial indicating that the police officers believed they were arresting the other person, rather than petitioner.

While a trial judge's order denying a new trial on the ground of newly discovered evidence will not be disturbed in the ordinary case, it will be reversed on the ground of abuse of discretion when there are extraordinary circumstances. (*U. S. v. Johnson,* 327 U.S. 106; *Wolcher v. U. S.,* 76 S. Ct. 254.) The circumstances of this case are extraordinary, in that it is quite obvious that the evidence of confusion of identities would have had profound effect on the jury. Refusal to grant a new trial so such evidence could be introduced into the case amounted to a violation of petitioner's rights to a fair trial.

Question No. 6. (Discriminatory appellate procedure.)

In 1960, the people of the State of California adopted an amendment to the California Constitution consisting of Section 4e of Article VI thereof, which provides that the District Courts of Appeal shall have appellate jurisdiction of cases within the original jurisdiction of the Municipal and Justice Courts, to the extent and in the manner provided by law. (See Appendix B, infra, p. 29.) The Legislature subsequently enacted Section 1471 of the California Penal Code, which provides that the District Courts of Appeal may order a case transferred as provided by rules of the Judicial Council, when a Superior Court certifies, or the District Court of Appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law. (See Appendix B, infra, pp. 29-30.) The judicial Council has promulgated Rules 61 to 69, inclusive, of the California Rules of Court, which establish the mechanics of the appeal procedure. (See Appendix B, infra, pp. 30-39.) The operation of the California System for appellate review of Municipal Court judgments is described in 15 Hastings Law Journal 11. The emphasis is on civil cases, but the procedure is similar in criminal cases.

The appeal procedure which has resulted from the combination of statutory law and court rules has brought about a system whereby a defendant charged with a crime which happens to fall within the original jurisdiction of the Superior Court has one method of review of his case and a defendant who is unfortunate enough to be accused of a crime falling within the jurisdiction of a Municipal Court has quite another, and more limited, opportunity for review. The distinction between these types of crime is based on the arbitrary foundation of whether the penalty is a county jail or a state prison sentence.

While it is true that procedural due process and equal protection of the laws under the United States Constitution does not require that there be a right to appeal or review of all cases, the Constitution does protect those charged with crime from discrimination by the establishment of arbitrary classifications of categories of criminal cases for the purposes of appeal. (*Cole v. Arkansas,* 333 U.S. 196; *Griffin v. Illinois,* 351 U.S. 12.) When a state chooses to establish an appellate review system in criminal cases, it may not, consistently with the federal constitution, foreclose some categories of accused persons from the right to the same procedure for review that is afforded others in essentially similar positions for reasons having no relation to a rational policy of criminal appeal. (*Burns v. Ohio,* 360 U.S. 252; *Griffin v. Illinois,* supra.)

In the instant case the petitioner has been foreclosed from hearing by the normal appellate procedure he would have been able to follow if his case had fallen within the jurisdiction of the Superior Court. He has been required to follow a writ procedure resulting in denial of relief without hearing or opinion. The procedure he has been forced to follow is arbitrary and capricious and not based on a rational and constitutional differentiation of classes.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, July 25, 1966.

Respectfully submitted,
Alvin M. Cibula,
Jeremiah R. Scott, Jr.,
Counsel for Petitioner.

(Appendices Follow)

Appendix A

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1. CERTIFIED COPY OF CLERK'S ENTRY OF PROCEEDINGS AND JUDGMENT OF MUNICIPAL COURT.

In the Municipal Court of Eureka Judicial District
County of Humboldt, State of California

G 5491

The People of the State of California,
Plaintiff,
vs.
Peter Omicini,
Defendant.

Complaint of Arlie Hayes
Charging Sec. 647F & 148
Penal Code
Alvin M. Cibula Redding
Attorney for Defendant

Date	Proceedings	Fees
Dec 3 1964	—Complaint filed.	
Dec 7 1964	—Defendant per atty, A. Cibula in Court fully informed of his rights. Statutory period of time waived. Case cont to Dec. 29, 1964 at 1:30 P.M. for plea. Bail cont.	

Dec 7 1964—Pending Bail Rec'd from Sheriff of Humb. #31398 139—

Dec 29 1964—Defendant Omicini in court. Case cont to Jan 19, 1965 at 1:30 P.M. Bail cont.

Jan 7 1965—Stipulation filed cont case to Jan. 29, 1965.

Jan 29 1965—Defendant Omicini with Atty Cibula in Court. Plead Not Guilty and requested Trial by Jury. Statutory period of time waived. Jury Trial set for May 6, 1965 at 10:00 AM. Judge Robert N. Conners Disqualified himself. Bail continued.

May 6 1965—Honorable Charles M. Thomas, Jr. Presiding Helen Verna, Court Reporter. Defendant Omicini in court with Attorneys Alvin M. Cibula and Jeremiah R. Scott, Sr. Prosecuting Attorney Albert Newton for People. The following people were sworn and served as jurors:

1. Earline Murphy
2. Julian J. Pawlus
3. Delmar Nielson
4. Louise Meeks
5. Mrs. Mary D. Grate
6. Mrs. Mary Helm
7. Mrs. Hilda C. Norman
8. Mrs. Katherine M. Hartley
9. Mrs. Mearl R. Maloney
10. Jack Nelson
11. Mrs. Hazel M. Lloyd
12. Delora Brown

Case adjourned to May 7, 1965 at 9:30 A.M.

May 7 1965—Presiding Judge Charles M. Thomas, Jr. Helen Verna, Court Reporter. Stipulated by counsel all jurors present and accounted for. Defendant Omicini present with counsel Atty's Cibula and Scott, Jr. Prosecuting Attorney Albert Newton present. Motion by Defense to exclude

all witnesses with exception of the investigating officer: Sargent O'Brian
cont to Pg 298-299-300-280

Peoples opening statements. Defense waived opening statements. The following witnesses were called, sworn and testified for the People. No. 1. Clifford Irving Williams, Officer Williams diagrammed on Blackboard the area of arrest. Witness No. 2. Donald L. Lead sworn and testified. Witness No. 3. Alfred Smithee sworn and testified. Defendants exhibit A. Pink slip with booking information from Sheriff's office entered in evidence. Peoples witness No. 4. Stedman Anderson sworn and testified. Peoples Witness No. 5. Donald Pinkerton sworn and testified. The following witnesses were called, sworn and testified for the Defense out of order: 1. James Wilkinson; 2. Gilbert Trood; 3. Frank Kinney. People resumed with witness No. 6 Bernard Forsman, sworn and testified. Peoples exhibit No. 1 Movie of Defendant for identification offered as People No. 1. Peoples exhibit No. 1 entered in evidence. Recess to 9:30 A.M. on May 10, 1965 in Room 213.

May 10 1965—Stipulated by counsel, all present and accounted for. Peoples witness #7. Almon Brewster sworn and testified. Defendants exhibit B. California operators license belonging to Peter Omicini marked for identification. Plaintiff exhibit #2. Report drawn by Almon Brewster marked for identification. Motion in Chambers by Atty Newton to question Mr. Lax who was seen talking to Mrs. Helm and Mrs. Norman, both are jurors. Jurors removed from courtroom, Mr Edgar-Andrew Lax, sworn and examined by Mr. Newton. Motion to exclude testimony of Mr. Lax. Motion denied.

cont page 299—

Jurors returned to courtroom. Peoples witness No. 8 John Joseph O'Brian called, sworn and testified. People rest. Officer Stedman Anderson recalled for Defense. Defendants exhibit "C" for Identification a white copy of pink slip in evidence as exhibit "A". Defendants witness No. 4. Dr. Walter W. Dolfini. Defendants Exhibit "D" records of Dr. Dolfini entered for identification. Counsel stipulated exhibit "D" be returned to Dr. Dolfini. The following witnesses were sworn and testified for Defense: No. 5. Sero Maffia; No. 6. A. J. Franceschi; No. 7. Jack C. Paddock. No. 8. Clifford Kirkemo; No. 9. John Vance; 10. Edgar A. Lax, previously sworn; No. 11. Joseph Theron Vance; No. 12. Charles P. Cavagnaro, No. 13. Ruth Larson; No. 14. Barney Thomas Gallagher; No. 15. Ellis J. Bryant, No. 16. William Stout. Defendant, Peter Omicini sworn and testified on his own behalf. Defense rests. Officer Clifford Williams recalled in rebuttal by Prosecution, Officers Donald Leach and Sgt. John O'Brian recalled in rebuttal by Prosecuting Attorney. Defendant Peter Omicini recalled in rebuttal by Defense. Opening Arguments by Prosecuting Attorney. Closing Arguments by Defense.

Closing Arguments by Prosecuting Attorney—Recess

May 11 1965—Stipulated by counsel, all present and accounted for. Jury instructions given. Phyllis Wilson, Matron and Guy V. Robinson Bailiff, sworn in as jury attendants. Jury retired at 10:56 A.M. 11:00 AM all present except Jury—Motion by Prosecution to exclude any comments from spectators—Motion granted. Stipulated all present. Jury stated Julian J. Pawlus, Foreman. Movies shown. Testimony of Sgt. John J. O'Brian read by Helen Verna, Court Reporter. Jury returned at 4:43 P.M. cont. page 300

The People of the State of California Plaintiff, vs Peter Omicini, Defendant. Verdict of Jury We, the Jury find the Defendant Peter Omicini Guilty in violation of Section 148 Penal Code of California dated 5-11-65 J. J. Pawlus, Foreman. The People of the State of California Plaintiff vs Peter Omicini, Defendant. Verdict of Jury We, the Jury find the Defendant Peter Omicini Not Guilty in violation of Section 647F of the Penal Code of California. Dated 5-11-65. J. J. Pawlus Foreman. Motion for New Trial orally made by Atty Scott, Jr. set for hearing May 14, 1965 at 2:00 P.M. Defendant R.O.R.

May 14 1965—Request for Extension of Time to Hear Defendants Motion for New Trial.

Defendant Omicini in court with counsel, J. Scott, Jr, and Howard Corbin, for Prosecuting

Atty Albert Newton being present the following proceedings were had:

Motion for extension of time granted. Case cont to May 25, 1965 at 2:00 P.M. Motion by defense attorney for free transcript. Motion declared premature at this time.

May 19 1965—Notices mailed to involved parties.

May 21 1965—Motion for New Trial filed.

May 25 1965—Amendment to Motion for New Trial Filed.

Defendant in Court with Atty Jeremiah B. Scott, Jr. Attorney Albert Newton and Leonard Conry, Prosecuting Attorneys in court. Presiding Judge Charles M. Thomas, Jr. Helen Verna—Court Reporter. Motion for new trial made by atty Scott, Jr. Objections made by Attorney Newton. Motion for new trial denied. Motion by Defense to stay execution—declared premature. It is the judgment of this court that Defendant Omicini serve 60 days in the Humboldt County Jail. Suspended. And as further Order of the court Defendant is placed on Summary Probation for 1 year cont to page 280

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cont from page 300

G-5491—People vs. Peter Omicini

Defendant is required to report to Municipal Court quarterly during the probationary period, and Defendant may have record expunged after 1 year. It is the judgment of this court that Defendant Omicini pay a fine of $1,000.00 on or before the 10th day of June 1965 or serve 1 day in the County Jail for every $5.00 of said fine. Motion for stay of execution by Defense—Objections by Prosecuting Atty—Motion denied. Motion by Defense for free Reporters transcript—no objections Stipulated on behalf of People. Motion granted.

May 26 1965 Order for Free Reporter's Transcript filed.

Jun 1 1965—Notice of Appeal filed.

Jun 9 1965—Copy of Affidavit of Peter Omicini from Superior Court filed.

Copy of Notice of Motion from Superior Court to Stay Judgment and Stay the Execution thereof filed

Copy from Superior Court of Temporary Order Staying Judgment and Execution Thereof filed.

Jun 15 1965—Reporters Transcript filed.

Jun 21 1965—All Papers & pleadings forwarded to Fred J. Moore, Humboldt County Clerk.

State of California,
County of Humboldt—ss.

I hereby certify this instrument to be a full, true and correct copy of the original as the same now appears on file in this office.

Given under my hand and the seal of the Municipal Court of Eureka Judicial District, County of Humboldt, State of California this Jun 8, 1966.

By Margaret E. Johnson,
Clerk.

2. JUDGMENT OF SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF HUMBOLDT, APPELLATE DIVISION.

In the Superior Court of the State of California
in and for the County of Humboldt
Appellate Division

The People of the State of California, Plaintiff, vs. Peter Omicini, Defendant.	No. A-61-M

DECISION ON APPEAL

Defendant appeals from a verdict finding him guilty of a violation of Penal Code Section 148 and from the denial of a new trial. He states as his grounds of appeal, (1) that there is not evidence to support a finding of a violation of Section 148 of the Penal Code, (2) that there was an error in the instruction of the Court regarding proof of Section 148, (3) that certain requested instructions were not given, (4) that defendant was not informed of his rights and thus there was error in admitting statements of defendant, (5) that there was error in failure to grant defendant's motion for a new trial.

Defendant's principal contention is that there is no evidence to support a guilty finding of a violation of

Section 148 and thus the verdict of the jury cannot be upheld.

On appeal, we will look to the evidence which would tend to support the verdict and the verdict will not be overturned if there is evidence upon which it reasonably could be based. The evidence shows that defendant hung on to the patrol car in which the officers were seated and refused to permit them to proceed. It is defendant's position that they were not exercising official duties under the code section which provides penalties for one interfering with the officer in his performance of his official duty.

While it is true that there is nothing to show that at the time the officer was, or desired to, engage in active pursuit of traffic violators, still there is evidence from which the jury could conclude that defendant prevented the officers from proceeding. That they were at the time engaged in, or attempting to engage in their official duty of highway patrol. It does not seem reasonable to the Court to argue that a highway patrol officer is only on official duty when he is making an arrest or actively engaged in pursuit of violators. It is the duty of the highway patrol to patrol the highways, enforce traffic and other regulations thereon. For this purpose, an officer is assigned to a certain area in which he is engaged in his official duty during certain periods of time. One who physically interferes with the pursuit of this duty by hanging on to the patrol car, by standing in front of it, by preventing the officer from entering the car or otherwise interfering with his carrying out of the duties assigned to him would, in the opinion of the Court, be guilty of a violation of Vehicle Code Section 148.

The jury was instructed as to the elements of the section. While defendant requested an instruction that each element must be proved, the overall instructions were such that the jury was adequately instructed as to the burden of proof upon the People. That it was their burden to prove beyond a reasonable doubt and to a moral certainty the elements of the effect of the offense in question.

Defendant's statements, which were admitted at the trial, were statements made by him in the course of the commission of the offense. He was not found guilty of violation of other charged sections which might or might not have made certain other statements made by him questionable, if he were not informed of his rights prior to having made them. We can find no error in the admitting of the statements pertaining to the offense in question and no prejudice from having admitted statements which might pertain to other offenses, since the jury obviously did not find him guilty of the other offenses.

In regard to the failure to grant a new trial, regardless of who the officer might have thought he was arresting, the evidence is clear that the actor in the situation was the defendant in this instance. We find no error in the failure here to grant the motion for a new trial on the grounds specified.

The judgment of the lower Court and the verdict of the jury are affirmed.

Dated this .... day of October, 1965.

....
Judge of the Superior Court

....
Judge of the Superior Court

---

3. RULING ON APPLICATION FOR CERTIFICATION BY SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF HUMBOLDT, APPELLATE DIVISION.

[Title of Court and Cause]

RULING ON APPLICATION FOR CERTIFICATION

The application is denied.

Dated this 15th day of December 1965.

For the Appellate Department
Wm. G. Watson, Jr.
Presiding Judge

Fred J. Moore, Jr.
County Clerk
Filed Jan 4 1966 Filed
By Marjorie P. Willis
Deputy

4. JUDGMENT OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR FIRST APPELLATE DISTRICT.

In the District Court of Appeal
State of California
First Appellate District

Division Two

---

1 Criminal No. 5520

In Re
Peter Omicini
on Habeas Corpus.

By The Court

The petition for writ of Habeas Corpus is denied.

Dated, January 31, 1966.

Shoemaker, P. J.

Filed January 31, 1966,
Lawrence R. Elkington, Clerk.

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5. JUDGMENT OF THE SUPREME COURT OF STATE OF CALIFORNIA.

Crim. 9830—Omicini on Habeas Corpus. Petition for writ of habeas corpus denied.

Appendix B

Penal Code Section 148

§ 148. *Resisting, delaying, or obstructing officer; punishment*

Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. (As amended Stats.1957, c. 139, p. 742, § 30.)

California Constitution, Article VI, Section 4e

§ 4e. *District courts of appeal; appellate jurisdiction; cases within original jurisdiction of municipal and justice courts*

Sec. 4e. The district courts of appeal shall have appellate jurisdiction on appeal in all cases within the original jurisdiction of the municipal and justice courts, to the extent and in the manner provided for by law. (Added Nov. 8, 1960.)

Penal Code Section 1471

§ 1471. *Transfer to district court of appeal; grounds; power of reviewing court*

A district court of appeal may order any case on appeal within the original jurisdiction of the municipal and justice courts in its district transferred to it for hearing and decision as provided by rules of the Judicial Council when the superior court certifies, or the district court of appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

No case in which there is a right on appeal to a trial anew in the superior court shall be transferred pursuant to this section before a decision in such case becomes final therein.

A court to which any such case is transferred shall have similar power to review any matter and make orders and judgments as the superior court by statute would have in such case, except as otherwise expressly provided and except that if the case was tried anew in the superior court, the reviewing court shall have similar power to review any matter and make orders and judgments as it has by statute in a case within the original jurisdiction of the superior court. (Added Stats.1961, c. 693, p. 1935, § 18, operative Jan. 2, 1962.)

California Rules of Court, Rules 61-69

Rule 61. Definitions

In rules 61 to 69, inclusive, relating to transfer of cases on appeal within the original jurisdiction of municipal and justice courts, unless the context or subject matter otherwise requires:

(a) "Case" means any case on appeal within the original jurisdiction of a municipal or justice court.

(b) "Trial" includes trial anew pursuant to section 117j or subdivision (b) of section 983 of the Code of Civil Procedure, trial in the superior court pursuant to section 988h of the Code of Civil Procedure or section 1469 of the Penal Code, and a new trial. As amended, effective July 1, 1964.

(c) When a case has been tried in the superior court, "judgment" includes any order from which an appeal could be taken if the case were within the original jurisdiction of the superior court.

(d) "District Court of Appeal," "Presiding Justice," and "clerk of the District Court of Appeal" shall, if a case is transferred to the Supreme Court, mean "Supreme Court," "Chief Justice," and "clerk of the Supreme Court," respectively. Added, effective Jan. 2, 1962.

Rule 62. Transfer

(a) [*Cases transferable*] A District Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the District Court of Appeal on its own motion determines from an opinion of the appellate department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

(b) [*Time*] A transfer on certification may be ordered within 20 days after the record on transfer is filed in the District Court of Appeal unless the proceedings for transfer are previously dismissed

pursuant to subdivision (a) of rule 64. A transfer on the District Court of Appeal's own motion, as provided in subdivision (a), may be ordered within 30 days after the judgment of the appellate department of the superior court, including an order for a new trial pursuant to section 988h of the Code of Civil Procedure or section 1469 of the Penal Code, becomes final as to that court. As amended, effective July 1, 1964.

(c) [*Order*] The order granting or denying a transfer to a District Court of Appeal shall be filed with the clerk of the District Court of Appeal, and if no order is made within the time specified in this rule, the transfer on certification shall be deemed denied and the clerk shall enter a notation in the register to that effect.

(d) [*Oral argument*] Unless oral argument is waived, the case shall be placed on the calendar when the transfer is ordered.

(e) [*Notice of order*] As soon as an order of transfer is filed, the clerk shall transmit a certified copy thereof to the clerk of the superior court and shall mail to each party, and to the Attorney General in a criminal case, a notice stating that such order has been filed, the date of oral argument, and when briefs are permitted, the time for filing briefs as provided in rule 65. Upon denial of a transfer on certification, the clerk shall return the record on transfer and any exhibits to the clerk of the superior court and shall mail notice of the denial to each party and, in a criminal case, also to the Attorney General. Failure

of the clerk to mail any such notice shall not affect the jurisdiction of the District Court of Appeal. Added, effective Jan. 2, 1962.

Rule 63. Certification

(a) [*Authority to make*] The superior court on application of a party or on its own motion may certify that the transfer of a case to the District Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. Such certification may be made by a majority of the judges of the appellate department or, in a county having no appellate department, by the judge hearing the appeal. When there was a trial in the superior court, the judge who tried the case may make such certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who heard the appeal or tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court.

(b) [*Application for certification*] Any party may apply to the superior court for the certification of a case after judgment in that court. If there was no trial in the superior court such application shall be served and filed before the judgment on appeal becomes final as to that court and may be included in any petition for rehearing. If there was a trial in the

superior court the application shall be served and filed at least 10 days before expiration of the time for certification. Any other party may serve and file an opposition within five days after the filing of the application. No hearing shall be held on the application and the failure of the court to certify the case shall be deemed a denial of the application.

(c) [*Time*] The certification of a case in which there is no trial in the superior court shall be filed with the clerk of that court at any time after the record on appeal and the briefs, if any, are filed in the superior court and not later than 10 days after the judgment on appeal becomes final as to that court. The certification of a case in which there was a trial in the superior court shall be filed within 30 days after entry of the judgment or 15 days after service of written notice of entry of the judgment, whichever is earlier, in a civil case, or within 15 days after rendition of the judgment in a criminal case, unless the time is extended as provided in subdivision (d) of this rule.

(d) [*Extension of time*] The time for filing the certification of a case shall be extended by new trial proceedings or proceedings to vacate a judgment in the same manner, to the same extent, and for the same period as the time for filing notice of appeal is extended by such proceedings pursuant to rule 3 of the Rules on Appeal.

(e) [*Contents*] The certification shall contain a brief statement setting forth any conflict of decision (with citation of or reference to decisions creating the

conflict, if there is no written opinion by the superior court) or important question of law to be settled and shall state whether there was a judgment in the superior court, and, if so, the nature and the date thereof.

(f) [*Transmission*] Upon the filing of the certification the clerk of the superior court shall forthwith transmit a certified copy thereof to the clerk of the District Court of Appeal and shall mail notice of such certification to each of the parties and also to the Attorney General in a criminal case. Added, effective Jan. 2, 1962.

Rule 64. Record

(a) [*Contents*]

(1) [When there was no trial in superior court] In any case in which there was no trial in the superior court the record on transfer shall consist of the original records, briefs, all original papers, pleadings, documents, and exhibits on file in the case, any orders made by the superior court, and a copy of any opinion of the superior court.

(2) [When there was a trial in superior court] If there was a trial in the superior court, the record on transfer shall be prepared in a civil case pursuant to rules 4 to 9, inclusive, and in a criminal case pursuant to rules 33 to 36, inclusive, of the Rules on Appeal, as if the case were being appealed from the superior court. The periods of time allowed for doing any act in preparation of the record on transfer shall commence on the fifth day after the clerk's mailing of

the notice of certification instead of the date of filing notice of appeal. If neither party performs the acts necessary to procure the preparation and filing of the record in the District Court of Appeal within the time allowed therefor or within any valid extension of that time, and such failure is not the fault of any court officer, the proceedings for transfer may be dismissed on the District Court of Appeal's own motion.

(b) [*Transmission of record*] When a superior court certifies a case or when a District Court of Appeal on its own motion orders a case transferred to itself and the clerk of the superior court has received a certified copy of such order, he shall forthwith, or as soon as the record on transfer of a case tried in the superior court is completed, transmit to the clerk of the District Court of Appeal the record on transfer, together with any exhibits theretofore designated in the manner provided in rule 10 of the Rules on Appeal. In a criminal case in which there was a trial in the superior court he shall transmit to the Attorney General a copy of each transcript corrected to conform to the original and shall note the date of such transmission on the original transcripts. No undertaking or deposit in lieu thereof shall be transmitted. Added, effective Jan. 2, 1962.

Rule 65. Briefs

No brief shall be filed in a case transferred to the District Court of Appeal unless provided for herein, except by permission of the Presiding Justice. In a case transferred after a trial in the superior court, the

Presiding Justice shall designate which party is the appellant for the purpose of filing briefs, and briefs shall be served and filed within the following periods: appellant's opening brief, within 20 days after entry of the order of transfer; respondent's brief, within 20 days after the filing of appellant's opening brief; appellant's reply brief, if any, within 10 days after the filing of respondent's brief, but not later than the time of oral argument. Any party may join another party or other parties in a brief or may adopt by reference any brief in the same case. All briefs shall be in the style, size, and form prescribed by subdivision (b) of rule 37 of the Rules on Appeal and no brief shall exceed 20 pages, except by permission of the Presiding Justice. No brief shall be filed without proof of the deposit of one copy with the clerk of the superior court from which the case was transferred. In a criminal case every brief of the defendant shall be served on both the district attorney and the Attorney General. Added, effective Jan. 2, 1962.

Rule 66. When Judgments of Superior Court on Appeal Become Final

(a) [*Appellate departments*] Every judgment of the appellate department of a superior court shall become final as to that court as provided in rule 107 of the rules adopted by the Judicial Council for the appellate departments of the superior court.

(b) [*Superior courts in counties having no appellate department*] For purposes of these rules, in counties having no appellate department, every judg-

ment of the superior court on appeal in a case in which there is no right on appeal to a trial anew in the superior court, including an order for a new trial pursuant to section 988h of the Code of Civil Procedure or section 1469 of the Penal Code, shall become final as to that court upon the expiration of seven days after the same shall have been pronounced. Where the judgment is modified before it becomes final, as herein provided, the period specified herein begins to run anew, as of the date of modification; but a change of the opinion without modification of the judgment does not postpone the time when the judgment becomes final. As amended, effective July 1, 1964.

Rule 67. Stay of Proceedings and Judgment on Appeal Bond

(a) [*Stay of proceedings*] Upon the timely filing of a certification by the superior court or an order of transfer on the District Court of Appeal's own motion, further action, other than the preparation and transmission of the record, by the superior court in the case shall be stayed until the termination of such proceedings.

(b) [*Judgment on appeal bond*] If a case within the original jurisdiction of a small claims court is certified, judgment shall not be entered against the sureties on a bond filed pursuant to section 117*l* of the Code of Civil Procedure until the expiration of 20 days after the termination of such proceedings. Added, effective Jan. 2, 1962.

Rule 68. Transmission of Remittitur

The remittitur, upon issuance, shall be transmitted immediately, with a certified copy of the judgment and of the opinion, to the court from which the appeal was originally taken, except that when there was or, as a result of the appeal, will be a trial in the superior court, the remittitur shall be transmitted to that court. All original records, papers, documents, and exhibits, except any certification for transfer, the statement or transcripts on appeal, briefs, and notice of appeal, shall be returned with the remittitur. Added, effective Jan. 2, 1962; as amended, effective July 1, 1964.

Rule 69. Application of Rules

These rules shall apply (a) to any case where there is no right on appeal to a trial anew in the superior court and where the superior court shall not have pronounced judgment before the effective date of these rules, and (b) to any case in which there is a trial in the superior court and judgment is entered in a civil case or rendered in a criminal case on or after such effective date. Added, effective Jan. 2, 1962.

Appendix C

MOTION FOR NEW TRIAL AND AMENDMENT

In the Municipal Court of the
Eureka Judicial District
County of Humboldt, State of California

The People of the State of California,
Plaintiff,
vs.
Peter Omicini,
Defendant.
No. G-5491

MOTION FOR NEW TRIAL

Now comes the Defendant, Peter Omicini, and moves the above entitled Court for a new trial on the issue of the alleged violation of Section 148, Penal Code of the State of California, on the following grounds:

I

The District Attorney has been guilty of prejudicial misconduct during the trial thereof before a Jury as follows:

a. The District Attorney, in closing argument, instructed the Jury that if a verdict of "not guilty" was returned, Defendant could go to the Grand Jury for an investigation;

b. The District Attorney, in closing argument, instructed the Jury as a matter of law, that if they the

Jury, believed the Defendant was fabricating in at least one instance, then the Jury must believe that Defendant was fabricating in all of his testimony;

c. The District Attorney accused Defendant's counsel of misconduct in possessing a certain police report of Officer Leach, when in fact the contrary was true;

d. The District Attorney instructed the Defendant as a witness to demonstrate upon the Prosecutor the severity of physical "bumping" inflicted by police officers. This attempt was not a true representation of evidence and was caused to be made by the prosecutor with intent to incite Defendant and influence the Jury to Defendant's prejudice; (California Penal Code 1181 (5)).

II

The Court misdirected the Jury in a matter of law, or erred in the decision of any question of law arising during the course of the trial as follows:

a. Officer Leach testified that Defendant was not advised of his right to remain silent or his right to be represented by an attorney. No witness for the prosecution testified that Defendant was advised of his right to remain silent or his right to an attorney. By reason of the failure of the arresting officer to advise Defendant of his right to an attorney and his right to remain silent, the following evidence was inadmissible as a matter of law and should have been excluded:

1. Statement by Defendant that "I am as drunk as can be";

2. All pictures of Defendant taken by moving picture camera by Sheriff's officer Forson at Humboldt County Jail;

3. All alleged profane statements made by Defendant to arresting officer and Sheriff's officers.

People v. Dorado, 61 A.C. 892 (August 31, 1964);

California Penal Code Sec. 1181 (5).

b. The Court requested Defendant's counsel to limit to thirty minutes his closing argument to the Jury. Defendant's counsel stipulated to the time limit imposed by reason of his effort not to antagonize the Court. Limitation of oral argument to thirty minutes was an error by reason of the complexity and nature of the case.

c. The Court, with one exception, systematically excluded all of Defendant's proposed Jury instructions. (California Penal Code Sec. 1181(5).)

d. The evidence produced at the trial of Defendant showed that Defendant was denied the right to make a telephone call immediately after he was booked by arresting officer. This evidence was completely contradicting to California Penal Code Section 851.5. By reason of the provisions of Section 851.5 of the Penal Code of the State of California, the verdict or finding is contrary to law or evidence. (Penal Code Sec. 1181.6).

Dated: May 21, 1965.

Alvin M. Cibula
Scott & Scott
By Jeremiah R. Scott, Jr.

[Title of Court and Cause]

AMENDMENT TO MOTION FOR NEW TRIAL

Comes now the Defendant, Peter Omicini, and moves the above entitled Court for a new trial on the issue of the alleged violation of Section 148, Penal Code of the State of California, on the following grounds:

III

The Defendant herein hereby incorporates herein all grounds and in its entirety the written Motion for New Trial filed with the above entitled Court on May 21, 1965.

IV

Defendant alleges that for a further ground for new trial, that new evidence has been discovered material to the Defendant, and which [illegible] could not, with reasonable diligence, have discovered and produced at the trial, (Penal Code 1181 (8)), to wit:

A. That on or about 10:45 P. M., October 24, 1964, one Peter Pellascio was arrested by the Eureka Police Department in the City of Eureka, for an alleged violation of Section 23102, California Vehicle Code.

That on or about November 10, 1964, Peter Pellascio entered a plea of guilty to a violation of Section 23102, California Vehicle Code. That Defendant herein is informed and believes that Peter Pellascio at the time of his arrest and during his confinement by the Eureka Police Department, directed toward certain officers of the Eureka Police Department and/or Sheriff's Deputies of Humboldt County, vile, profane and infamous names and words. That California Highway Patrol Sergeant O'Brien testified in the trial of Defendant herein that "Officer Leach thought it was someone else" that he was arresting. That Defendant herein and Peter Pellascio are the same general age, weight, height, body structure and facially resemble each other. That on numerious prior occasions Peter Pellascio has been mistaken for Peter Omicini and vice versa. That Peter Omicini and Peter Pellascio are both of Swiss descent, have similar mannerisms and speak with a European accent. That Defendant herein is informed and believes and upon such information and belief alleges that by reason of the circumstances and nature of the arrest of Peter Pellascio, local law enforcement officers were alerted that a man answering the description of Peter Pellascio was a troublemaker and that he had directed vile, profane and infamous words toward law enforcement officers. That Defendant herein is informed and believes that Officer Leach believed that he was arresting Peter Pellascio. That Defendant herein is informed and believes that Officer Leach arrested Defendant herein not for reasons of a violation of Section 148, Penal Code California, but by reason of the resemblance in appearance of Peter Omicini and Peter Pellascio.

That Peter Pellascio informed Peter Omicini of the above on May 21, 1965. That Peter Omicini and Peter Pellascio informed Jeremiah R. Scott, Jr., Attorney for Defendant herein, of the above on May 22, 1965.

Attached hereto as Exhibit "A" and Exhibit "B" are photographs taken on May 22, 1965, of Peter Omicini and Peter Pellascio and by this reference made a part hereof.

That on or about May 22, 1965, Peter Pellascio informed Defendant herein, Peter Omicini, and his Attorney, Jeremiah R. Scott, Jr., that he would sign an Affidavit, a copy of which is attached hereto as Exhibit C. That on or about May 24, 1965, Peter Pellascio refused to sign the aforementioned Affidavit, and for this reason the original Affidavit is not filed herein. That Defendant is informed and believes that on or about May 24, 1965, Humboldt County District Attorney Leonard M. Conry instructed Peter Pelpascio to refuse to sign said Affidavit.

That on or about May 24, 1965, a criminal Subpoena was issued by the above entitled Court to direct Peter Pellascio to appear on the date set for the hearing of the motion for a new trial herein.

Wherefore Defendant prays that this Court grant a new trial to Defendant on the issue of the alleged violation of Section 148 Penal Code, California.

/s/ Peter Omicini
Peter Omicini, Defendant

Alvin M. Cibula
Scott & Scott
Attorneys for Defendant

EXHIBIT "A"

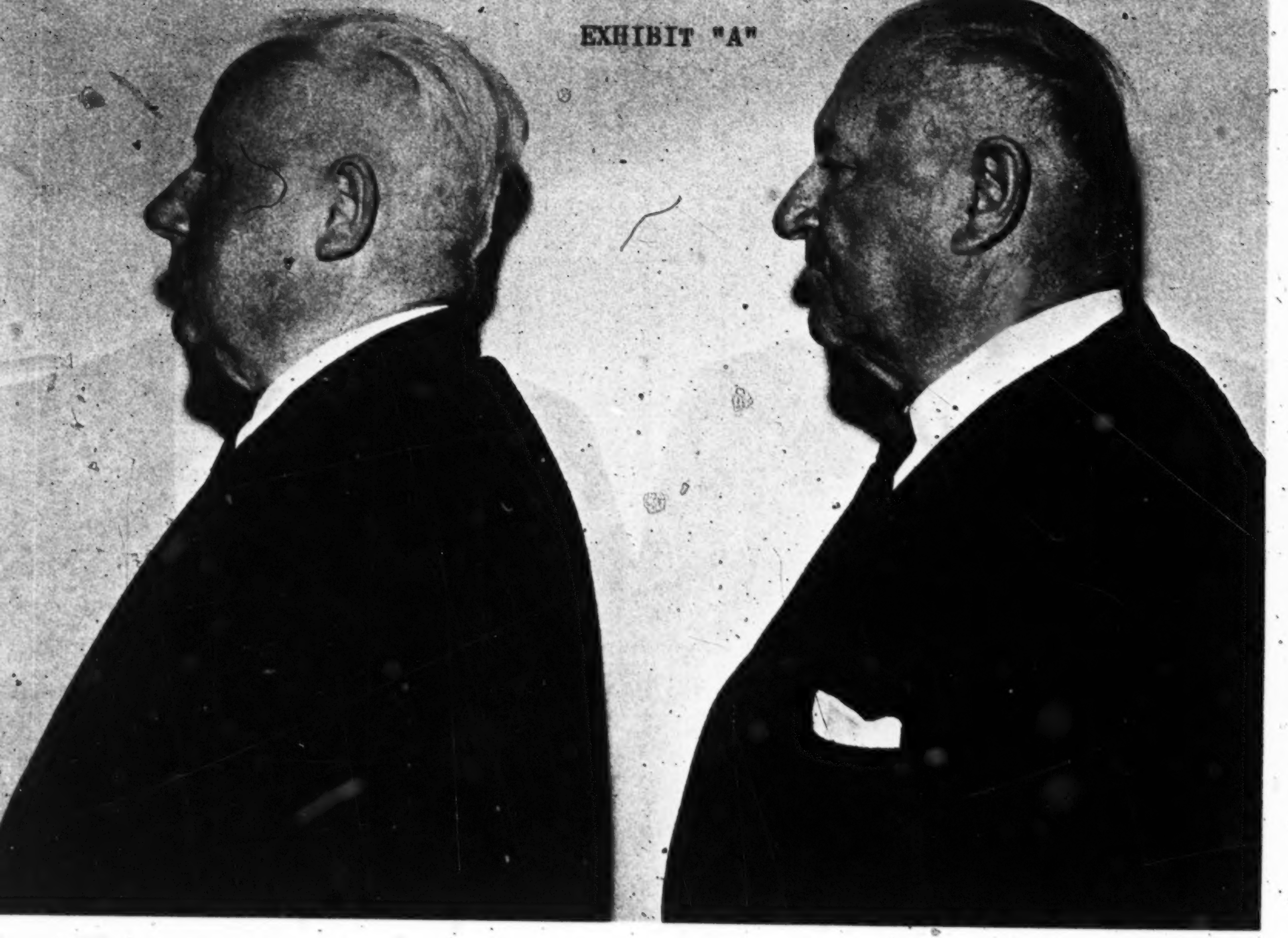

EXHIBIT "B"

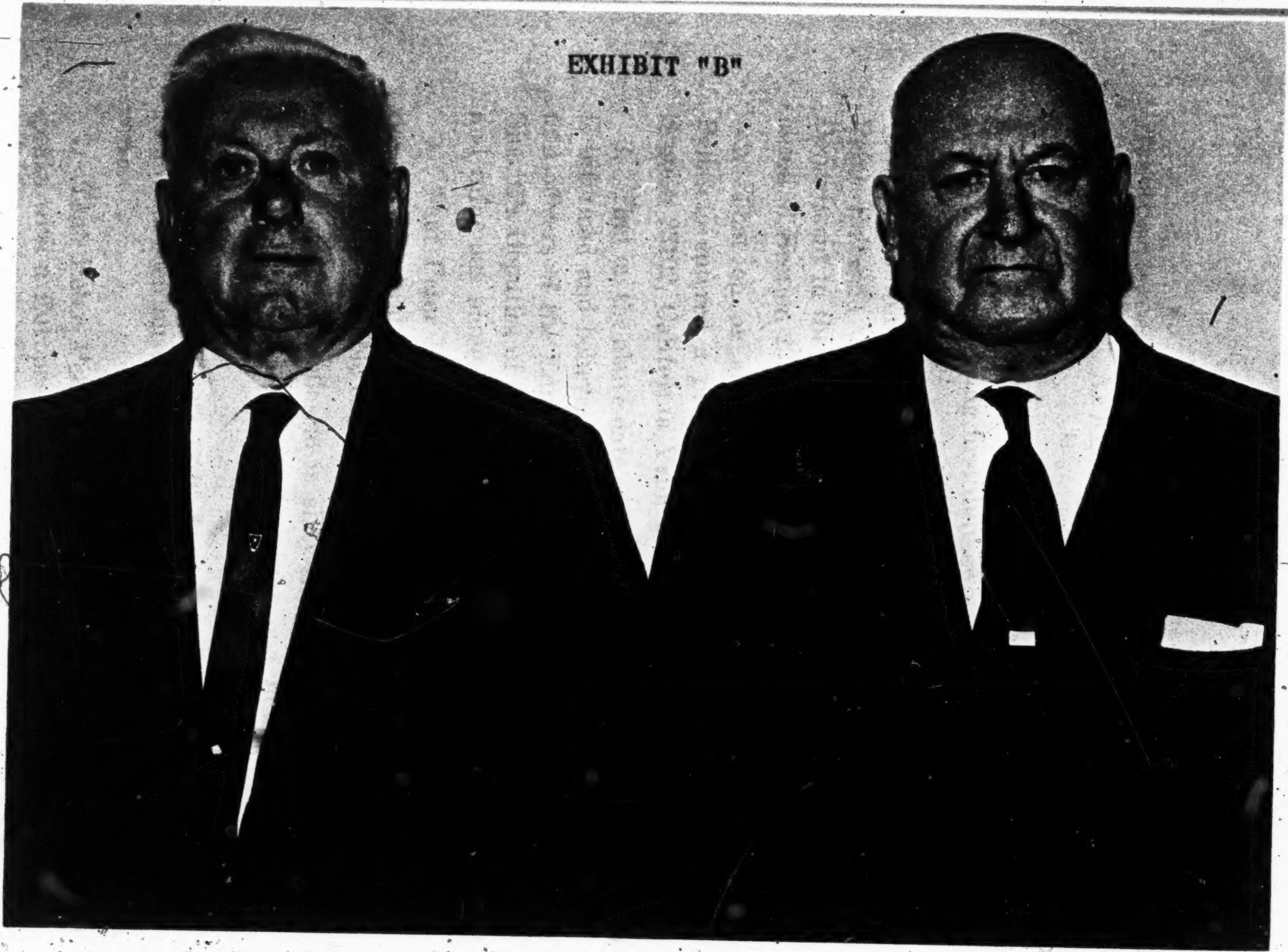

EXHIBIT "C"

[Title of Court and Cause]

AFFIDAVIT

State of California
County of Humboldt—ss.

Peter Pellascio, being first duly sworn, deposes and says:

1. That on or about 10:45 P. M., October 24, 1964, Peter Pellascio was arrested by the Eureka Police Department in the City of Eureka for an alleged violation of Section 23102, California Vehicle Code.

2. That on or about November 10, 1964, Peter Pellascio entered a plea of guilty to a violation of Section 23102, California Vehicle Code.

3. That on the above date of arrest, Peter Pellascio is informed and believes that he directed toward certain officers of the Eureka Police Department and/or Sheriff's Deputies of Humboldt County, vile, profane and infamous names and words.

4. That Peter Pellascio and Peter Omicini are of the same general age, weight, height, body structure and facially resemble each other.

5. That Peter Pellascio is sixty-six years of age, five feet five inches tall, and weighs one hundred ninety pounds.

6. That on numerous prior occasions Peter Pellascio has been mistaken for Peter Omicini, and vice versa.

7. That Peter Pellascio is of Swiss descent and speaks with a European accent.

8. That on or about May 21, 1965, Peter Pellascio informed Peter Omicini of the above.

9. That on or about May 22, 1965, Peter Pellascio informed Jeremiah R. Scott, Jr., Attorney for Peter Omicini, of the above.

Peter Pellascio

Subscribed and sworn to before me this ......th day of May, 1965.

....

Notary Public in and for said County

Appendix D

NOTICE OF APPEAL TO THE APPELLATE DIVISION, SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF HUMBOLDT

[Title of Court and Cause]

NOTICE OF APPEAL

To the Above Entitled Court and to the Clerk Thereof:

Notice Is Hereby Given that Peter Omicini, Defendant in the above entitled action, hereby appeals to the Appellate Division, Superior Court of the State of California, in and for the County of Humboldt, from the Judgment and Order denying Motion for New Trial made and entered in the above entitled action in favor of Plaintiff and against Defendant on May 25, 1965, and from each and every part, and the whole thereof.

Dated: June 1, 1965.

Scott & Scott
Alvin M. Cibula
Attorneys for Defendant and Appellant.
By Jeremiah R. Scott, Jr.

Filed June 1, 1965,
Margret E. Johnson, Clerk,
By Beulah Wahlund,
Deputy Clerk.

Appendix E

APPLICATION FOR CERTIFICATION TO DISTRICT COURT OF APPEAL

In the Superior Court of the State of California
in and for the County of Humboldt
Appellate Division

The People of the State of California, Plaintiff, vs. Peter Omicini, Defendant.	No. A-61-M

Proceedings for Transfer of Municipal Court Appeal
to District Court of Appeal
(California Rules of Court, Rule 61-69)

APPLICATION FOR CERTIFICATION

Appellant Peter Omicini, pursuant to Section 1471 of the Penal Code of the State of California, and pursuant to Rule 61-69 of the California Rules of Court, hereby applies for certification of the within case for transfer to the District Court of Appeal, First Appellate District, for hearing and decision.

Application for such certification is made on the following grounds:

This is a matter of first impression that has never been decided by a District Court of Appeal or the Supreme Court of the State of California. The "duty" or "official duty" construction of Penal Code of California Section 148, has never been construed. Defendant in his appeal has raised this issue. This is an important question of law which must be settled. There is also a conflict of decisions herein. The only California case attempting to construe said Section 148 Penal Code of California, is the Appellate Division of Los Angeles County Superior Court ruling of *People v. Perry* (1947) 79 C.A. 2d Supp. 906. The present case herein is in conflict with the *Perry* case, supra, as the Appellate Division of the above entitled Court affirmed the decision of the Municipal Court.

Dated: November 4, 1965.

Alvin M. Cibula
Scott & Scott
Attorneys for Defendant,
By Jeremiah R. Scott, Jr.

Filed November 4, 1965,
Fred J. Moore, Jr.,
County Clerk,
By Juanita L. Fassett, Deputy.

Appendix F

PETITION FOR WRIT OF HABEAS CORPUS TO DISTRICT COURT OF APPEAL

In the District Court of Appeal
State of California
First Appellate District

No. ......, Div. ......

In the Matter of the Application for
Writ of Habeas Corpus of
Peter Omicini

PETITION FOR WRIT OF HABEAS CORPUS

The Petition of Jeremiah R. Scott, Jr., respectfully shows:

1. That your Petitioner, Jeremiah R. Scott, Jr. is an Attorney duly licensed to practice before all the Courts of the State of California.

2. That Petitioner and Alvin M. Cibula are the Attorneys representing and defending Peter Omicini, referred to hereinafter as Defendant, who, on or about December 3, 1964, was charged by a Complaint on file in the Municipal Court in and for the Eureka Judicial District being No. G5491 of the records and files of said Court, with a violation of Sections 647F and 148 of the California Penal Code. Defendant was convicted of a violation of Section 148 of said Penal

Code, and Petitioner makes this Application for a Writ of Habeas Corpus on Defendant's behalf.

3. That any and all reference made herein to a violation of the said Section 148 of the Penal Code refers to acts and events alleged done by the said Defendant on the 2nd day of December, 1964, at which time it is alleged that the said Defendant violated said Section 148 which reads as follows:

> "Every person who willfully resists, delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

4. That on or about May 6, 1965 to May 11, 1965, trial by jury was had and the Defendant was found "guilty" of a violation of Section 148 of the California Penal Code, and was found "not guilty" of a violation of Section 647F of the Penal Code of the State of California.

5. That on or about May 25, 1965, Defendant's Motion for New Trial and Amendment to Motion for New Trial was denied by the said Municipal Court.

6. That on or about May 25, 1965, Judgment was pronounced as against Defendant by the said Municipal Court as follows:

(1) A fine of $1,000.00 or one day in the Humboldt County Jail for each $5.00 thereof;

(2) A sixty day sentence in the Humboldt County Jail, suspended;

(3) Probation for a period of one year.

7. That on or about June 1, 1965, Defendant filed a Notice of Appeal to the Appellate Division, Superior Court of the State of California in and for the County of Humboldt, said Appeal being Number A-61-M of the records and files of said Court.

8. That on or about October 27, 1965, the Appellate Division of said Superior Court affirmed the Judgment of the said Municipal Court and the verdict of the jury therein.

9. That on or about October 28, 1965, Petitioner received notice of the decision of the Appellate Division as mentioned in No. 8 above.

10. That on or about November 4, 1965, Defendant filed in the Appellate Division, Superior Court of the State of California in and for the County of Humboldt, an Application for Certification of the District Court of Appeal, First Appellate District, pursuant to Rules 61-69 of the California Rules of Court. The Application for such Certification was made upon the following grounds:

This is a matter of first impression that has never been decided by a District Court of Appeal or the Supreme Court of the State of California. The "duty" or "official duty" construction of Penal Code of California Section 148 has never been construed. Defendant in his appeal has raised this issue. This is an important question of law which must be settled. There is also a conflict of decisions herein. The only California case attempting to construe said Section 148 Penal Code of California, is the Appellate Division of

Los Angeles County Superior Court ruling of *People v. Perry* (1947) 79 C.A. 2d Supp. 906. The present case herein is in conflict with the *Perry* case, supra, as the Appellate Division of the above entitled Court affirmed the decision of the Municipal Court.

11. That on or about January 4, 1966, the Application for Certification was denied by the Appellate Division of the said Superior Court.

12. That Defendant has no other plain, speedy or adequate remedy at law, having exhausted his remedy at law by Appeal to the Appellate Division of the Superior Court of the State of California in and for the County of Humboldt. That Defendant has no plain, speedy or adequate remedy at law, having exhausted his remedy at law by filing an Application for Certification pursuant to California Rules of Court Sections 61-69, which was denied by the Appellate Division of the Superior Court of the State of California in and for the County of Humboldt.

13. That no other Petition for Writ of Habeas Corpus has been made by or on behalf of the Defendant relating to this cause.

14. That the said Defendant is being illegally restrained of his liberty and is now in the constructive custody of the Honorable Charles M. Thomas, Jr., Judge of the Municipal Court, Eureka Judicial District, by terms of probation for a period of one year and as set forth in the Judgment in Paragraph Six (6) above.

15. That said restraint and confinement is illegal, and the illegality thereof consists in this, to wit:

(A) Paragraphs One (1) to Fourteen (14) above are incorporated herein;

(B) The facts presented at the trial of this matter do not show a violation of Section 148 of the California Penal Code;

(C) The trial Court erred in instructing the Jury as to the law applicable in the case;

(D) The admission into evidence of incriminating statements allegedly made by Defendant was reversible error;

(E) The trial Court erred in denying Defendant's Motion for New Trial on the grounds of newly discovered evidence;

(F) That it violates the provisions of Article 1, Section 1, Section 3 and Section 13 of the Constitution of the State of California, and the due process clause of the XIV Amendment to the Constitution of the United States.

Wherefore, Petitioner prays that a Writ of Habeas Corpus be issued directing that the Defendant, Peter Omicini, be brought before this Court without delay and that the said Court hear evidence concerning his confinement and the legality of such restraint, and upon a determination that Defendant is illegally and unlawfully restrained, order the release and discharge of said Defendant forthwith.

Alvin M. Cibula
Scott & Scott
By Jeremiah R. Scott, Jr.
Jeremiah R. Scott, Jr.

State of California
County of Humboldt—ss.

Jeremiah R. Scott, Jr., being first duly sworn, deposes and says:

That he is one of the Attorneys for Peter Omicini in the foregoing Petition for Writ of Habeas Corpus; that he has read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein alleged upon information and belief, and as to those matters that he believes it to be true.

/s/ Jeremiah R. Scott, Jr.

Subscribed and sworn to before me this 25 day of January, 1966.

(Seal)

Nora H. Scott
Notary Public in and for the County
of Humboldt, State of California.

My Commission Expires Sept. 16, 1969.

In the District Court of Appeal
State of California
First Appellate District

No. ...., Div. ....

In the Matter of the Application for
Writ of Habeas Corpus for
Peter Omicini

POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS

I

DO THE FACTS SHOW A VIOLATION OF SECTION 148 OF THE CALIFORNIA PENAL CODE?

For purposes of this Petition only, the following facts as stated by the District Attorney in his opening statement are conceded to be true (Reporter's Transcript P. 3, L. 14 to P. 5, L. 4):

> The first one will tell you, his name is Officer Williams, that he has been in law enforcement for approximately five and a half years. On the evening of December 2nd of 1964, approximately 10:15 P.M., he and his partner, Officer Leach, made a routine stop out here on 101 just inside the City limits, somebody had made a bad pass. They stopped the gentleman who made the bad

pass, gave him a warning and they started to leave. After talking to this gentleman who was driving a Ranchero, Officer Williams noticed this man who he will identify as Peter Omicini. He kept watching the patrol car. Officer Williams stopped and said, "What can I help you with, sir?" And the fellow, Omicini, said "You are against me". He said, "Why what do you mean 'against you'?" The fellow said, "you are against me. You are always making arrests out here. You shouldn't patrol this area."

Officer Williams said, "I'm not going to argue with you. I'm just going to leave." So, Williams ran around the patrol car and got in on the driver's side. Officer Leach got in on the passenger side.

Mr. Omicini came over, grabbed onto the window of the car. Mr. Leach—Officer Leach took his hands off the window of the car. He grabbed onto the window and said "Communists. You people are all after me. You can't make any more arrests out here. You can't tear out my street out here. You can't put in a stop sign out here. You can't put any parking meters out here".

And Officer Williams will tell you that he started to drive the patrol car, that Mr. Omicini would have his hands on the window. Officer Leach will tell you that he took his hands off three times.

Officer Leach will further tell you that at that time Peter Omicini reached in the patrol car and grabbed the officer by the front of the jacket. At that time the Officer opened up the door and stepped out and said, "You are under arrest for obstructing an officer in carrying out his duties."

> Officer Williams will tell you that they shoved him—put him in the back seat of the patrol car, brought him into our County Jail; will further tell you of the dialogue that this gentleman told him about how: Len Conry was no good; Len Conry would get him out of his trouble; that the City Council was against him; that the County Board of Supervisors were against him; that the State was against him.

In addition, Defendant sets forth verbatim the testimony of Officer Leach in so far as it is pertinent to the charge on which Defendant was convicted. (Reporter's Transcript P. 71, L. 4-22):

> Q. All right, did Mr. Omicini in any way interfere with the checking out of that person?
>
> A. Mr. Omicini didn't interfere with the checking out of this person, no sir.
>
> Q. He did not. No interference with an officer there, is that correct, whatsoever?
>
> A. No, sir. There was not at this time, no sir.
>
> Q. All right. The car actually left before the rest of this took place, did it not? Can you remember?
>
> A. I can't remember at what point it did depart.
>
> Q. It did leave?
>
> A. It did leave, yes, sir.
>
> Q. And that was because you decided not to give the man a citation?
>
> A. That's correct.
>
> Q. All right. Now, then, from then on you were no longer engaged in any duty, except the duty of proceeding on the Highway patrol; is that correct?
>
> A. That's correct.

Section 148 of the Penal Code reads as follows:

> "Every person who willfully resists, delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

This crime has four elements: (1) Willfullness, (2) resistance, delay or obstruction, (3) a public officer, (4) some official duty which the officer is then discharging or attempting to discharge. *People v. Perry* (1947) 79 CA (2) Supp. 906.

In the *Perry* case, at 79 C.A. 2d 908, the Court states:

> "On all elements of the offense, including the fourth, the prosecution had the burden of proof. (*People v. Rabalete* (1938), 28 Cal. App. 2d 480, 487 (82 P. 2d 707); *McGuire v. State* (1923), 19 Ala. App. 138 (95 So. 565, 567); *Harris v. City of Tuscaloosa* (1926), 21 Ala. App. 392 (108 So. 768, 769); *State v. Winter* (1913), 24 Idaho 749 (135 P. 739, 740).)

The first three elements are present in the present case—the fourth is completely missing.

The facts in the present case show that at the time of the alleged offense the officers had no duty to perform other than merely being alive police officers. If they were obstructed or delayed it was only to drive their automobile upon the highway. They had no place to report, no one to arrest, no one to investigate, no process to serve. What can be said to be the duty that was delayed or obstructed?

To cite a hypothetical example: A foot patrolman is patroling his beat. He is deliberately tripped. Has a violation of 148 P.C. occurred? Obviously he is delayed from going on his beat, but what official duty is being delayed?

The point is that the duty must be an active one—not merely the being an official on duty.

The authorities bear out the above:—*Wharton Criminal Law and Procedure,* Vol. 3, page 633 states:

> "It is likewise essential that the obstruction be offered with respect to an official on public duty which the officer *attempts* to perform . . . (emphasis added)."

In 67 CJS, page 50, the rule is stated as follows:

> "In order to constitute the offense of resisting or obstructing an officer in the performance of a duty, it must appear that the officer at the time of the resistance or obstruction was actually performing a duty pertaining to his office, and an act which may in its remote consequences only, prevent the officer from performing his official duty does not constitute the offense". (See also, *State v. Lovett,* 3 Vermont Reports, p. 110).

In Perkins Criminal Law, at page 423, the rule is stated as follows:

> "Resisting, delaying, or obstructing one who is an officer does not constitute obstruction of justice unless the officer is at the time discharging or attempting to discharge some official duty - - -".

It is obvious that the mere act of preventing the officers from going on patrol at that moment is too remote a consequence.

Any attempt to construe 148 P.C. to be broad enough to cover this factual situation would make the statute so vague and ambiguous that it would violate the due process sections of both the California and the United States Constitutions.

One must remember that the legislature has made the violation of this section a high misdemeanor. They must have had in mind that only the active duty was being protected, not the mere existing as an officer.

The arguments heretofore mentioned were raised by Defendant on Appeal to the Appellate Division, Superior Court of the State of California, in and for the County of Humboldt.

In *Thompson v. City of Louisville,* (1960) 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624, the Supreme Court reversed the conviction of the Defendant on the ground that a conviction based on the evidence presented would not be consistent with the Due Process clause of the 14th Amendment of the United States Constitution. The Defendant was shuffling his feet to the beat of the music in a cafe when arrested for loitering. Outside the cafe he argued with the officers who then charged him with disorderly conduct.

That Court stated, at 80 S. Ct. 629:

> "We assume, for we are justified in assuming that the merely 'arguing' with a policeman is not, because it could not be, disorderly conduct 'as a matter of substantive law of Kentucky'."

In *Garner v. Louisiana,* (1961) 368 U.S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248, the Court reversed the conviction of Defendants charged with disturbing the peace which was the "commission of any act in such a manner as to unreasonably disturb or alarm the public". The only evidence presented was that the Defendants had conducted a peaceful sit-in demonstration at a "white" lunch counter to protest discrimination. After a review of Louisiana law, the Court concluded that the only reasonable interpretation of the Statute is that the State must prove an act which might "foreseeably disturb or alarm the public". The Court could find no such evidence.

It appears that the *Thompson* and *Garner* cases are analogous to the present case. To convict Defendant herein on the evidence presented would violate the due process clause of the California and United States Constitutions. Defendant's actions were harmless and not extraordinary in light of the circumstances. Defendant was merely attempting to complete a conversation, although heatedly, with the Highway Patrol officer.

II

DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY AS TO THE LAW APPLICABLE IN THE CASE?

Defendant submitted various proposed instructions to the trial Court for purposes of instructing the Jury. The following Jury instruction was submitted by the Defendant:

> The Court instructs the Jury that it is mandatory that the prosecution must prove every element of the following statute:
>
> "Every person who wilfully resists, delays, or obstructs any public officer in the discharge or attempt to discharge any duty of his office - - -". *Penal Code* Section 148.

The trial Court refused to instruct the Jury in any manner pertaining to the elements of Section 148 of the Penal Code of the State of California, and specifically refused to instruct the Jury as to the above proposed jury instruction submitted by Defendant.

As pointed out in the *Perry* case, discussed in (I) above, the prosecution must prove every element of Section 148, Penal Code of the State of California. The prosecution failed to prove any duty being performed by the officers. With no existing duty being proven by the prosecution, it is incumbent upon the trial Court to instruct the Jury that is was necessary for the Jury to find all elements present to find the Defendant guilty.

California Penal Code Section 1093(6) states as follows:

> "The Judge may then charge the Jury, and must do so on any points of law pertinent to the issue, if requested by either party; - - -"

The above section was construed by *People v. Williamson,* (1907) 6 C.A. 336, wherein it was held that it was reversible error for a Court to refuse to give an instruction which correctly states the law applicable to the facts testified to by Defendant.

In *People v. Baker,* (1954) 42 C. 2d 550, at 42 C. 2d 576, the Court held that it is incumbent upon a Court in a criminal case to instruct the Jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. The Court stated at 42 C. 2d 576, that

> "an instruction is necessary if it is vital to a proper consideration of the evidence by the Jury. (Citations). . . . The circumstances of the case determine whether or not the failure to instruct the Jury constitutes prejudicial error." (Citations).

The above cases point out that if a submitted instruction is crucial to an element or issue in the particular case, the wording of Penal Code Section 1093(6) of California, becomes mandatory. A refusal of such an instruction would be reversible error.

In the present case, evidentiary proof of all of the elements of Section 148 Penal Code of the State of California, was necessary. Because of the importance of the element of "official duty", it was necessary and mandatory upon the trial Court to instruct the Jury as to Defendant's proposed instruction as set forth above, or at least as to proof of all of the elements being required for a conviction.

The *Garner* case, supra, appears to create a constitutional argument that vague statutes must be construed to preserve a reasonable application consistent with "due process". The term "wilfullness" appears in Penal Code Section 148. Was the act of the Defendant "wilful" or did the Defendant "foreseeably" resist, delay or obstruct? It appears that the Jury must be instructed of wilfullness or foreseeability in order to comply with due process in light of the *Garner* case.

III

WAS THE ADMISSION INTO EVIDENCE OF INCRIMINATING STATEMENTS ALLEGEDLY MADE BY DEFENDANT, REVERSIBLE ERROR? WAS DEFENDANT'S MOTION FOR NEW TRIAL IMPROPERLY DENIED?

In Defendant's Motion for New Trial, Defendant argued that a new trial should have been granted on the grounds that certain statements made by Defendant should not have been admitted into evidence.

The following is a discussion of those statements:

Officer Williams testified as follows: He said, "I'm going to stand on the Fifth Amendment. I'm drunk as can be." (Reporter's Transcript, P. 46, L. 11-12).

Oh, three or four times up in the—up in the Sheriff's Department he just said, "I'm drunk as can be". (Reporter's Transcript, P. 49, L. 24-25).

Officer Leach testified as follows:

> Q. Officer, did you at any time when you were arresting Mr. Omicini, advise him of his rights as a man under arrest?
>
> A. No, sir, I did not.
>
> Q. Did you at any time advise him of his right to remain silent and say nothing?
>
> A. No, sir, I did not. (Reporter's Transcript, P. 97, L. 1-6).

> Witness: It was not until approximately thirty days later that we got the Dorado decision which stated that in a felony case the Defendant had a right to counsel to be present at the time of questioning by a police officer.

Mr. Brewster testified as follows (Reporter's Transcript, P. 200, L. 2-6):

> Q. Did you hear him saying anything else at that time?
>
> A. Well, after I was through with the questioning, I was waiting for the camera, one of the officers asked him if he was—how the liquor was affecting him or if he was—he said, "I'm drunk as can be."

All witnesses for the prosecution failed to testify that Defendant had been advised of his right to remain silent and of his right to have an attorney present. (Reporter's Transcript).

All witnesses for the prosecution testified that Defendant used vile and profane language subsequent to his arrest. (Reporter's Transcript).

Defendant's Motion for New Trial, filed on May 21, 1965, stated that as a ground for new trial, the above evidence was improperly admitted into evidence.

On August 31, 1964, the Supreme Court of the State of California held that, once the investigation focused on Defendant, any incriminating statements given by Defendant during interrogation by the investigating officers, became inadmissible in the absence of counsel and by the failure of the officer to advise Defendant of his right to an attorney and his right to remain silent. *People v. Dorado,* (1964) 61 A.C. 982. The *Dorado* case, supra, further held that the use of involuntary confessions or admissions results in a denial of due process and requires reversal "regardless of other evidence of guilt".

The *Dorado* (supra) decision was based upon the United States Supreme Court case of *Escobedo v. Illinois,* (1964) .... U.S. ...., 84 S. Ct. 1758, which held that no statement elicited by the police during the interrogation may be used against a Defendant at a criminal trial when the Defendant has not been advised of his right to an attorney and of his right to remain silent.

In the instant case, the testimony bears out that Defendant was not advised of his right to remain silent or of his right to an attorney.

Evidence was introduced by the prosecution that Defendant used vile and profane language and that Defendant made statements that he was drunk. By reason of the *Dorado* case, supra, and the *Escobedo* (supra) decisions, this evidence was improperly admitted. Clearly the introduction of this evidence was reversible error.

What was the effect of these statements allegedly made by Defendant?

Did this evidence unduly prejudice the Defendant in the minds of the Jury?

Certainly statements of vile and profane language and admissions of being drunk offered by the prosecution would prejudice the Defendant in the eyes of the Jury.

The normal mental reaction of a juror would dictate that an innocent Defendant would not make such statements.

Such statements being allowed into evidence are a direct violation of the due process clauses of the 14th Amendment of the United States Constitution, and are also in violation of the due process clause of the Constitution of the State of California.

The lower Court, in ruling on Defendant's Motion for New Trial, filed on May 21, 1965, decided that the above statements and admissions were admissible. In the light of the *Dorado* (supra) and *Escobedo* (supra) decisions, this ruling was clearly reversible error and a new trial should have been granted.

IV

DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE?

Officer O'Brien testified as follows (Reporter's Transcript, P. 254, L. 26 to P. 255, L. 4):

> Q. Did you inform anyone what the name of the Defendant was at that time?
>
> A. I probably—I may have told, I don't really recall. Yes, I do. At the time I did tell Officer Leach who the Defendant was. He thought it was someone else.

On or about May 25, 1965, Defendant filed an Amendment to Motion for New Trial, wherein it was alleged that new evidence had been discovered, material to the Defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial pursuant to California Penal Code Section 1181(8). The trial Court denied Defendant's Motion for New Trial.

Defendant's Motion for New Trial on the ground of newly discovered evidence was predicated upon the following facts:

> That prior to the arrest of Defendant, one Peter Pellascio was arrested and plead guilty to a violation of Section 23102, California Vehicle Code. That Pellascio and Defendant are of the same age, weight, height, body structure and facially resemble each other. That both Pellascio and Defendant are of Swiss descent. That Defendant was informed and believed that Pellascio had directed vile and profane language toward the arresting officers. That Defendant was informed and believed that by reason of the circumstances and nature of the arrest of Pellascio, local law enforcement officers were alerted that a man answering that description of Pellascio was a trouble maker. That Defendant was informed and believed that Officer Leach believed that he was arresting Pellascio.

The latest case construing Section 1181(8) of the California Penal Code is *People v. Williams,* (1962) 57 C. 2d 263.

In the *Williams* (supra) case, a denial of a Motion for New Trial was reversed on the theory of an abuse of discretion on the part of the trial Court. The *Williams* (supra) case is similar to the case at bar in that the sole evidence of Defendant's guilt was the uncorroborated testimony of the victim. In the present case, the only evidence of resisting or obstructing is that of victims Leach and Williams.

The *Williams* (supra) case held that in determining whether there has been a proper exercise of discretion on a Motion for New Trial on the ground of newly discovered evidence, the case must be judged from its own factual background.

The *Williams* case further held that where the newly discovered evidence contradicts the strongest evidence introduced against Defendant and comes from an unexpected source, it is proper that Defendant should have the opportunity of trying to present such evidence for the consideration of the trier of facts.

In the case at bar, Defendant at all times vehemently denied that he touched the patrol car or an officer.

The only testimony contrary to that of the Defendant was that of victims Leach and Williams.

The testimony of Officer O'Brien brought out the fact that Leach thought he was arresting someone else.

The jury was not able to hear testimony pertaining to the Pellascio incident combined with the testimony of O'Brien, to the effect that Leach thought he was arresting someone else. A granting of a new trial could have brought out this testimony.

Certainly testimony and evidence of the newly discovered evidence might have shed a different light on the facts in a new trial. The denial of the Motion for New Trial on newly discovered evidence was an abuse of discretion and unduly prejudiced the Defendant.

V

IS A WRIT OF HABEAS CORPUS A PROPER REMEDY HEREIN?

In *In Re Petersen,* 51 C. 2d 177, it was held that the availability of a Writ of Habeas Corpus does not depend on actual detention in prison. It was further held that a Petitioner is constructively in custody when bail has been issued.

As heretofore stated, Defendant appealed to the Appellate Division, Superior Court of the State of California in and for the County of Humboldt, which affirmed the Municipal Court proceedings.

The *Application for Certification* was filed pursuant to California Rules of Court 61-69 on the following grounds:

> "This is a matter of first impression that has never been decided by a District Court of Appeal or the Supreme Court of the State of California. The 'duty' or 'official duty' construction of Penal Code of California Section 148, has never been construed. Defendant in his appeal has raised this issue. This is an important question of law which must be settled. There is also a conflict of decisions herein. The only California case attempting to construe said Section 148 Penal Code of California, is the Appellate Division of Los Angeles County Superior Court ruling of *People*

> *v. Perry,* (1947) 79 C.A. 2d Supp. 906. The present case herein is in conflict with the *Perry* case, supra, as the Appellate Division of the above entitled Court affirmed the decision of the Municipal Court."

It is the contention of Defendant that there is in this case an important question of law which must be settled and that there is a conflict of decisions herein. As heretofore stated, the *Perry* case, supra, is the only California case construing the "official duty" or "duty" of Penal Code Section 148.

Is a Petition for Writ of Habeas Corpus proper at this time?

In *Wallace v. Edwards,* 217 C.A. 2d 64, it was held that:

> "Except as our jurisdiction may be invoked by Petition for an original writ, we may review judgments of the superior Court on appeal from a small claim Court only where the case has been duly transferred to us pursuant to rules 61 to 69 of California Rules of Court".

Defendant herein has exhausted his Appeal remedies, and now seeks an *original Writ* by petitioning for the Writ prayed for herein.

In re Sterling, 235 A.C.A. 266, the Court held that where Defendants exhausted their legal remedies with respect to the use of illegally obtained evidence to secure their conviction by appealing to the Superior Court's Appellate department and where, without a published opinion or certification to the District Court of Appeal, no further appeal was authorized under the rules (*Cal. Rules of Court,* Rule 62), a Writ of Habeas Corpus should be granted.

In the case of *In re Zerbe,* 60 C. 2d 666, it was held that a Defendant is entitled to Habeas Corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct. In the *Zerbe* case, supra, the Superior Court, Appellate Division, certified the case. Here the question arises as to whether Defendant's conduct was prohibited by Penal Code Section 148. The Court further stated, at 60 C. 2d 667:

> "For purposes of this Writ as well as prohibition or certiorari, the term 'jurisdiction' is not limited to its fundamental meaning and in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the Court's powers as defined by constitutional provision, statute, or rules developed by Courts."

The *Sterling* case, supra, stands for the proposition that Defendant herein, although certification was refused, may seek the remedy of a Writ of Habeas Corpus in the District Court of Appeal.

In light of the *Perry* case, supra, and the *Sterling* case, supra, together with the facts of the case herein, the Writ should issue.

Respectfully submitted,
Alvin M. Cibula
Scott & Scott
Attorneys for Defendant.
By Jeremiah R. Scott, Jr.
Jeremiah R. Scott, Jr.

Appendix G

PETITION FOR WRIT OF HABEAS CORPUS TO CALIFORNIA SUPREME COURT

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In the Supreme Court of the State of California

No.

In the Matter of the Application for
Writ of Habeas Corpus of
Peter Omicini.

PETITION FOR WRIT OF HABEAS CORPUS

The Petition of Jeremiah R. Scott, Jr., respectfully shows:

1. That your Petitioner, Jeremiah R. Scott, Jr. is an Attorney duly licensed to practice before all the Courts of the State of California.

2. That Petitioner and Alvin M. Cibula are the Attorneys representing and defending Peter Omicini, referred to hereinafter as Defendant, who, on or about December 3, 1964, was charged by a Complaint on file in the Municipal Court in and for the Eureka Judicial District being No. G5491 of the records and files of said Court, with a violation of Sections 647F and 148 of the California Penal Code. Defendant was convicted of a violation of Section 148 of said Penal Code, and Petitioner makes this Application for a Writ of Habeas Corpus on Defendant's behalf.

3. That any and all reference made herein to a violation of the said Section 148 of the Penal Code refers to acts and events alleged done by the said

Defendant on the 2nd day of December, 1964, at which time it is alleged that the said Defendant violated said Section 148 which reads as follows:

> "Every person who willfully resists, delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

4. That on or about May 6, 1965 to May 11, 1965, trial by jury was had and the Defendant was found "guilty" of a violation of Section 148 of the California Penal Code, and was found "not guilty" of a violation of Section 647F of the Penal Code of the State of California.

5. That on or about May 25, 1965, Defendant's Motion for New Trial and Amendment to Motion for New Trial was denied by the said Municipal Court.

6. That on or about May 25, 1965, Judgment was pronounced as against Defendant by the said Municipal Court as follows:

(1) A fine of $1,000.00 or one day in the Humboldt County Jail for each $5.00 thereof;

(2) A sixty day sentence in the Humboldt County Jail, suspended;

(3) Probation for a period of one year.

7. That on or about June 1, 1965, Defendant filed a Notice of Appeal to the Appellate Division, Superior Court of the State of California in and for

the County of Humboldt, said Appeal being Number A-61-M of the records and files of said Court.

8. That on or about October 27, 1965, the Appellate Division of said Superior Court affirmed the Judgment of the said Municipal Court and the verdict of the jury therein.

9. That on or about October 28, 1965, Petitioner received notice of the decision of the Appellate Division as mentioned in No. 8 above.

10. That on or about November 4, 1965, Defendant filed in the Appellate Division, Superior Court of the State of California in and for the County of Humboldt, an Application for Certification to the District Court of Appeal, First Appellate District, pursuant to Rules 61-69 of the California Rules of Court. The Application for such Certification was made upon the following grounds:

This is a matter of first impression that has never been decided by a District Court of Appeal or the Supreme Court of the State of California. The "duty" or "official duty" construction of Penal Code of California Section 148 has never been construed. Defendant in his appeal has raised this issue. This is an important question of law which must be settled. There is also a conflict of decisions herein. The only California case attempting to construe said Section 148 Penal Code of California, is the Appellate Division of Los Angeles County Superior Court ruling of *People v. Perry* (1947) 79 C.A. 2d Supp. 906. The present case herein is in conflict with the *Perry* case, supra, as the Appellate Division of the above entitled Court affirmed the decision of the Municipal Court.

11. That on or about January 4, 1966, the Application for Certification was denied by the Appellate Division of the said Superior Court.

12. That Defendant has no other plain, speedy or adequate remedy at law, having exhausted his remedy at law by Appeal to the Appellate Division of the Superior Court of the State of California in and for the County of Humboldt. That Defendant has no plain, speedy or adequate remedy at law, having exhausted his remedy at law by filing an Application for Certification pursuant to California Rules of Court Sections 61-69, which was denied by the Appellate Division of the Superior Court of the State of California in and for the County of Humboldt.

13. That Petitioner filed a Petition for Writ of Habeas Corpus in the District Court of Appeal of the State of California in and for the First Appellate District on January 26, 1966, on behalf of Defendant herein relating to this cause. On January 31, 1966, the Petition for Writ of Habeas Corpus was denied by the District Court of Appeal of the State of California in and for the First Appellate District.

14. That the said Defendant is being illegally restrained of his liberty and is now in the constructive custody of the Honorable Charles M. Thomas, Jr., Judge of the Municipal Court, Eureka Judicial District, by terms of probation for a period of one year and as set forth in the Judgment in Paragraph Six (6) above.

15. That said restrain and confinement is illegal, and the illegality thereof consists in this, to wit:

(A) Paragraphs One (1) to Fourteen (14) above are incorporated herein;

(B) The facts presented at the trial of this matter do not show a violation of Section 148 of the California Penal Code;

(C) The trial Court erred in instructing the Jury as to the law applicable in the case;

(D) The admission into evidence of incriminating statements allegedly made by Defendant was reversible error;

(E) The trial Court erred in denying Defendant's Motion for New Trial on the grounds of newly discovered evidence;

(F) That it violates the provisions of Article I, Section 1, Section 3, and Section 13 of the Constitution of the State of California, and the due process clause of the XIV Amendment to the Constitution of the United States.

Wherefore, Petitioner prays that a Writ of Habeas Corpus be issued directing that the Defendant, Peter Omicini, be brought before this Court without delay and that the said Court hear evidence concerning his confinement and the legality of such restraint, and upon a determination that Defendant is illegally and unlawfully restrained, order the release and discharge of said Defendant forthwith.

Alvin M. Cibula,
Scott & Scott,
By Jeremiah R. Scott,
Jeremiah R. Scott, Jr.

State of California,
County of Humboldt—ss.

Jeremiah R. Scott, Jr., being first duly sworn, deposes and says:

That he is one of the Attorneys for Peter Omicini, in the foregoing Petition for Writ of Habeas Corpus; that he has read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein alleged upon information and belief, and as to those matters that he believes it to be true.

Jeremiah R. Scott, Jr.

Subscribed and sworn to before me
this 17 day of February, 1966.
(Seal) Nora H. Scott,
Notary Public in and for the County
of Humboldt, State of California.

In the Supreme Court of the State of California

No.

In the Matter of the Application for
Writ of Habeas Corpus of
Peter Omicini.

POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS

I

DO THE FACTS SHOW A VIOLATION OF SECTION 148 OF THE CALIFORNIA PENAL CODE?

For purposes of this Petition only, the following facts as stated by the District Attorney in his opening statement are conceded to be true: (Reporter's Transcript P. 3, L. 14 to P. 5, L. 4)

> The first one will tell you, his name is Officer Williams, that he has been in law enforcement for approximately five and a half years. On the evening of December 2nd of 1964, approximately 10:15 p.m., he and his partner, Officer Leach, made a routine stop out here on 101 just inside the City limits, somebody had made a bad pass. They stopped the gentleman who made the bad pass, gave him a warning and they started to leave. After talking to this gentleman who was

driving a Ranchero, Officer Williams noticed this man who he will identify as Peter Omicini. He kept watching the patrol car. Officer Williams stopped and said, "What can I help you with, sir?" And the fellow, Omicini, said "You are against me." He said, "Why what do you mean 'against you'?" The fellow said, "you are against me. You are always making arrests out here. You shouldn't patrol this area."

Officer Williams said, "I'm not going to argue with you. I'm just going to leave." So, Williams ran around the patrol car and got in on the driver's side. Officer Leach got in on the passenger side.

Mr. Omicini came over, grabbed onto the window of the car. Mr. Leach—Officer Leach took his hands off the window of the car. He grabbed onto the window and said "Communists." "You people are all after me. You can't make any more arrests out here. You can't tear out my street out here. You can't put in a stop sign out here. You can't put any parking meters out here."

And Officer Williams will tell you that he started to drive the patrol car, that Mr. Omicini would have his hands on the window. Officer Leach will tell you that he took his hands off three times.

Officer Leach will further tell you that at that time Peter Omicini reached in the patrol car and grabbed the officer by the front of the jacket. At that time the Officer opened up the door and stepped out and said, "You are under arrest for obstructing an officer in carrying out his duties."

Officer Williams will tell you that they shoved him—put him in the back seat of the patrolcar,

> brought him into our County Jail; will further tell you of the dialogue that this gentleman told him how: Len Conry was no good; Len Conry would get him out of his trouble; that the City Council was against him; that the County Board of Supervisors were against him; that the State was against him.

In addition, Defendant sets forth verbatim the testimony of Officer Leach in so far as it is pertinent to the charge on which Defendant was convicted. (Reporter's Transcript P. 71, L. 4-22):

> Q. All right, did Mr. Omicini in any way interfere with the checking out of that person?
>
> A. Mr. Omicini didn't interfere with the checking out of this person, no sir.
>
> Q. He did not. No interference with an officer there, is that correct, whatsoever?
>
> A. No, sir. There was not at this time, no sir.
>
> Q. All right. The car actually left before the rest of this took place, did it not? Can you remember?
>
> A. I can't remember at what point it did depart.
>
> Q. It did leave?
>
> A. It did leave, yes, sir.
>
> Q. And that was because you decided not to give the man a citation?
>
> A. That's correct.
>
> Q. All right. Now, then, from then on you were no longer engaged in any duty, except the duty of proceeding on the Highway patrol; is that correct?
>
> A. That's correct.

Section 148 of the Penal Code reads as follows:

> "Every person who willfully resists, delays, or obstructs any public officer in the discharge of or attempt to discharge any duty of his office, when no other punishment is prescribed is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

This crime has four elements: (1) Willfullness, (2) resistance, delay or obstruction, (3) a public officer, (4) some official duty which the officer is then discharging or attempting to discharge. *People v. Perry* (1947) 79 C.A. (2) Supp. 906.

In the *Perry* case, at 79 C.A. 2nd 908, the Court states:

> "On all elements of the offense, including the fourth, the prosecution had the burden of proof. (*People v. Rabalete* (1938), 28 Cal. App. 2d 480, 487 (82 P. 2d 707); *McGuire v. State* (1923), 19 Ala. App. 138 (95 So. 565, 567); *Harris v. City of Tuscaloosa* (1926), 21 Ala. App. 392 (108 So. 768, 769); *State v. Winter* (1913), 24 Idaho 749 (135 P. 739, 740).)"

The first three elements are present in the present case—the fourth is completely missing.

The facts in the present case show that at the time of the alleged offense the officers had no duty to perform other than merely being alive police officers. If they were obstructed or delayed it was only to drive their automobile upon the highway. They had no place to report, no one to arrest, no one to investigate, no process to serve. What can be said to be the duty that was delayed or obstructed?

To cite a hypothetical example: a foot patrolman is patroling his beat. He is deliberately tripped. Has a violation of 148 P.C. occurred? Obviously he is delayed from going on his beat, but what official duty is being delayed?

The point is that the duty must be an active one—not merely the being an official on duty.

The authorities bear out the above: *Wharton Criminal Law and Procedure,* Vol. 3, page 633 states:

> "It is likewise essential that the obstruction be offered with respect to an official on public duty which the officer *attempts* to perform . . . (emphasis added)."

In 67 *CJS,* page 50, the rule is stated as follows:

> "In order to constitute the offense of resisting or obstructing an officer in the performance of a duty, it must appear that the officer at the time of the resistance or obstruction was actually performing a duty pertaining to his office, and an act which may in its remote consequences only, prevent the officer from performing his official duty does not constitute the offense." (See also, *State v. Lovett,* 3 Vermont Reports, p. 110).

In Perkins Criminal Law, at page 423, the rule is stated as follows:

> "Resisting, delaying, or obstructing one who is an officer does not constitute obstruction of justice unless the officer is at the time discharging or attempting to discharge some official duty . . .".

✓

It is obvious that the mere act of preventing the officers from going on patrol at that moment is too remote a consequence.

Any attempt to construe 148 P.C. to be broad enough to cover this factual situation would make the statute so vague and ambiguous that it would violate the due process sections of both the California and the United States Constitutions.

One must remember that the legislature has made the violation of this section a high misdemeanor. They must have had in mind that only the active duty was being protected, not the mere existing as an officer.

The arguments heretofore mentioned were raised by Defendant on Appeal to the Appellate Division, Superior Court of the State of California, in and for the County of Humboldt.

In *Thompson v. City of Louisville* (1960) 362 U.S. 199, 4 L Ed 2d 654, 80 S. Ct. 624, the Supreme Court reversed the conviction of the Defendant on the ground that a conviction based on the evidence presented would not be consistent with the due process clause of the 14th Amendment of the United States Constitution. The Defendant was shuffling his feet to the beat of the music in a cafe when arrested for loitering. Outside the cafe he argued with the officers who then charged him with disorderly conduct.

That Court stated, at 80 S. Ct. 629:

> "We assume, for we are justified in assuming that the merely 'arguing' with a policeman is not, because it could not be disorderly conduct 'as a matter of substantive law of Kentucky'."

In *Garner v. Louisiana* (1961) 368 US 157, 7 L Ed 2d 207, 82 S. Ct. 248, the Court reversed the conviction of Defendants charged with disturbing the peace which was the "commission of any act in such a manner as to unreasonably disturb or alarm the public." The only evidence presented was that the Defendants had conducted a peaceful sit-in demonstration at a "white" lunch counter to protest discrimination. After a review of Louisiana law, the Court concluded that the only reasonable interpretation of the Statute is that the State must prove an act which might "foreseeably disturb or alarm the public". The Court could find no such evidence.

It appears that the *Thompson* and *Garner* cases are analogous to the present case. To convict Defendant herein on the evidence presented would violate the due process clause of the California and United States Constitutions. Defendant's actions were harmless and not extraordinary in light of the circumstances. Defendant was merely attempting to complete a conversation, although heatedly, with the Highway Patrol Officers.

II

DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY AS TO THE LAW APPLICABLE IN THE CASE?

Defendant submitted various proposed instructions to the trial Court for purposes of instructing the Jury. The following Jury Instruction was submitted by the Defendant:

> The Court instructs the Jury that it is mandatory that the prosecution must prove every element of the following statute:
>
> "Every person who wilfully resists, delays, or obstructs any public officer in the discharge or attempt to discharge any duty of his office . . .". *Penal Code* Section 148.

The trial Court refused to instruct the Jury in any manner pertaining to the elements of Section 148 of the Penal Code of the State of California, and specifically refused to instruct the Jury as to the above proposed jury instruction submitted by Defendant.

As pointed out in the *Perry* case, discussed in (I) above, the prosecution must prove every element of Section 148, Penal Code of the State of California. The prosecution failed to prove any duty being performed by the officers. With no existing duty being proven by the prosecution, it is incumbent upon the trial Court to instruct the Jury that it was necessary for the Jury to find all elements present to find the Defendant guilty.

California Penal Code Section 1093(6) states as follows:

> "The Judge may then charge the Jury, and must do so on any points of law pertinent to the issue, if requested by either party; . : ."

The above section was construed by *People v. Williamson* (1907) 6 C.A. 336, wherein it was held that it was reversible error for a Court to refuse to give an instruction which correctly states the law applicable to the facts testified to by Defendant.

In *People v. Baker* (1954) 42 C. 2nd 550, at 42 C. 2nd 576, the Court held that it is incumbent upon a Court in a criminal case to instruct the Jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. The Court stated at 42 C. 2nd 576, that

> "an instruction is necessary if it is vital to a proper consideration of the evidence by the Jury. (Citations) . . . The circumstances of the case determine whether or not the failure to instruct the Jury constitutes prejudicial error." (Citations.)

The above cases point out that if a submitted instruction is crucial to an element or issue in the particular case, the wording of Penal Code Section 1093(6) of California becomes mandatory. A refusal of such an instruction would be reversible error.

In the present case, evidentiary proof of all of the elements of Section 148 Penal Code of the State of California was necessary. Because of the importance of the element of "official duty", it was necessary and mandatory upon the trial Court to instruct the Jury as to Defendant's proposed instruction as set forth above, or at least as to proof of all of the elements being required for a conviction.

The *Garner* case, supra, appears to create a constitutional argument that vague statutes must be construed to preserve a reasonable application consistent with "due process". The term "wilfullness" appears in Penal Code Section 148. Was the act of the Defendant "wilful" or did the Defendant "foreseeably" resist, delay or obstruct? It appears that the Jury must be instructed of wilfullness or foreseeability in order to comply with due process in light of the *Garner* case.

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III

WAS THE ADMISSION INTO EVIDENCE OF INCRIMINATING STATEMENTS ALLEGEDLY MADE BY DEFENDANT REVERSIBLE ERROR? WAS DEFENDANT'S MOTION FOR NEW TRIAL IMPROPERLY DENIED?

In Defendant's Motion for New Trial, Defendant argued that a new trial should have been granted on the grounds that certain statements made by Defendant should not have been admitted into evidence.

The following is a discussion of those statements:

Officer Williams testified as follows: He said, "I'm going to stand on the Fifth Amendment. I'm drunk as can be." Reporter's Transcript p. 46, l. 11-12;

Oh, three or four times up in the—up in the Sheriff's Department he just said, "I'm as drunk as can be." Reporter's Transcript p. 49, l. 24-25.

Officer Leach testified as follows:

> "Q. Officer did you at any time when you were arresting Mr. Omicini, advise him of his rights as a man under arrest?
>
> A. No, sir, I did not.
>
> Q. Did you at any time advise him of his right to remain silent and say nothing?
>
> A. No, sir, I did not." (Reporter's Transcript p. 97, l. 1-6.)
>
> "Witness: It was not until approximately thirty days later that we got the Dorado decision which stated that in a felony case the Defendant had a right to counsel to be present at the time of questioning by a police officer."

Mr. Brewster testified as follows: (Reporter's Transcript p. 200, l. 2-6)

> Q. Did you hear him saying anything else at that time?
>
> A. Well, after I was through with the questioning, I was waiting for the camera, one of the officers asked him if he was—how the liquor was affecting him or if he was—he said, "I'm drunk as can be."

All witnesses for the prosecution failed to testify that Defendant had been advised of his right to remain silent and of his right to have an attorney present. (Reporter's Transcript).

All witnesses for the prosecution testified that Defendant used vile and profane language subsequent to his arrest. (Reporter's Transcript).

Defendant's Motion for New Trial, filed on May 21, 1965, stated that as a ground for new trial, the above evidence was improperly admitted into evidence.

On August 31, 1964, the Supreme Court of the State of California held that, once the investigation focused on Defendant, any incriminating statements given by Defendant during interrogation by the investigating officers, became inadmissible in the absence of counsel and by the failure of the officer to advise Defendant of his right to an attorney and his right to remain silent. *People v. Dorado* (1964) 61 A.C. 982. The *Dorado* case, supra, further held that the use of involuntary confessions or admissions results in a denial of due process and requires reversal "regardless of other evidence of guilt."

The *Dorado* (supra) decision was based upon the United States Supreme Court case of *Escobedo v. Illinois* (1964) .... U.S. ...., 84 S. Ct. 1758, which held that no statement elicited by the police during the interrogation may be used against a Defendant at a criminal trial when the Defendant has not been advised of his right to an attorney and of his right to remain silent.

In the instant case, the testimony bears out that Defendant was not advised of his right to remain silent or of his right to an attorney.

Evidence was introduced by the prosecution that Defendant used vile and profane language and that Defendant made statements that he was drunk. By reason of the *Dorado* case, supra, and the *Escobedo* (supra) decisions, this evidence was improperly admitted. Clearly the introduction of this evidence was reversible error.

What was the effect of these statements allegedly made by Defendant?

Did this evidence unduly prejudice the Defendant in the minds of the Jury?

Certainly statements of vile and profane language and admissions of being drunk offered by the prosecution would prejudice the Defendant in the eyes of the Jury.

The normal mental reaction of a juror would dictate that an innocent Defendant would not make such statements.

Such statements being allowed into evidence are a direct violation of the due process clauses of the 14th Amendment of the United States Constitution, and are also in violation of the due process clause of the Constitution of the State of California.

The lower Court, in ruling on Defendant's Motion for New Trial, filed on May 21, 1965, decided that the above statements and admissions were admissible. In the light of the *Dorado* (supra) and *Escobedo* (supra) decisions, this ruling was clearly reversible error and a new trial should have been granted.

IV

DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE?

Officer O'Brien testified as follows (Reporter's Transcript p. 254, l. 26 to p. 255, l. 4):

> "Q. Did you inform anyone what the name of the Defendant was at that time?
>
> A. I probably—I may have told, I don't really recall. Yes, I do, at the time I did tell Officer Leach who the Defendant was. He thought it was someone else."

On or about May 25, 1965, Defendant filed an Amendment to Motion for New Trial wherein it was alleged that new evidence had been discovered, material to the Defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial pursuant to California Penal Code Section 1181(8). The trial Court denied Defendant's Motion for New Trial.

Defendant's Motion for New Trial on the ground of newly discovered evidence was predicated upon the following facts:

> That prior to the arrest of Defendant, one Peter Pellascio was arrested and plead guilty to a violation of Section 23102 California Vehicle Code. That Pellascio and Defendant are of the same age, weight, height, body structure and facially resemble each other. That both Pellascio and Defendant are of Swiss descent. That Defendant was informed and believed that Pellascio had directed

> vile and profane language toward the arresting officers. That Defendant was informed and believed that by reason of the circumstances and nature of the arrest of Pellascio, local law enforcement officers were alerted that a man answering that description of Pellascio was a trouble maker. That Defendant was informed and believed that Officer Leach believed that he was arresting Pellascio.

The latest case construing Section 1181(8) of the California Penal Code is *People v. Williams* (1962) 57 C. 2d 263.

In the *Williams* (supra) case, a denial of a Motion for New Trial was reversed on the theory of an abuse of discretion on the part of the trial Court. The *Williams* (supra) case is similar to the case at bar in that the sole evidence of Defendant's guilt was the uncorroborated testimony of the victim. In the present case, the only evidence of resisting or obstructing is that of victims Leach and Williams.

The *Williams* (supra) case held that in determining whether there has been a proper exercise of discretion on a Motion for New Trial on the ground of newly discovered evidence, the case must be judged from its own factual background.

The *Williams* case further held that where the newly discovered evidence contradicts the strongest evidence introduced against Defendant and comes from an unexpected source, it is proper that Defendant should have the opportunity of trying to present such evidence for the consideration of the trier of facts.

In the case at bar, Defendant at all times vehemently denied that he touched the patrol car or an officer.

The only testimony contrary to that of the Defendant was that of victims Leach and Williams.

The testimony of Officer O'Brien brought out the fact that Leach thought he was arresting someone else.

The jury was not able to hear testimony pertaining to the Pellascio incident combined with the testimony of O'Brien, to the effect that Leach thought he was arresting someone else. A granting of a new trial could have brought out this testimony.

Certainly testimony and evidence of the newly discovered evidence might have shed a different light on the facts in a new trial.

The denial of the Motion for New Trial on newly discovered evidence was an abuse of discretion and unduly prejudiced the Defendant.

V

IS A WRIT OF HABEAS CORPUS A PROPER REMEDY HEREIN?

In *In re Petersen,* 51 C. 2d 177, it was held that the availability of a Writ of Habeas Corpus does not depend on actual detention in prison. It was further held that a Petitioner is constructively in custody when bail has been issued.

As heretofore stated, Defendant appealed to the Appellate Division, Superior Court of the State of California in and for the County of Humboldt, which affirmed the Municipal Court proceedings.

The *Application for Certification* was filed pursuant to California Rules of Court 61-69 on the following grounds:

> "This is a matter of first impression that has never been decided by a District Court of Appeal or the Supreme Court of the State of California. The "duty" or "official duty" construction of Penal Code of California Section 148, has never been construed. Defendant in his appeal has raised this issue. This is an important question of law which must be settled. There is also a conflict of decisions herein. The only California case attempting to construe said Section 148 Penal Code of California, is the Appellate Division of Los Angeles County Superior Court ruling of *People v. Perry* (1947) 79 C.A. 2d Supp. 906. The present case herein is in conflict with the *Perry* case, supra, as the Appellate Division of the above entitled Court affirmed the decision of the Municipal Court."

It is the contention of Defendant that there is in this case an important question of law which must be settled and that there is a conflict of decisions herein. As heretofore stated, the *Perry* case, supra, is the only California case construing the "official duty" or "duty" of Penal Code Section 148.

Is a Petition for Writ of Habeas Corpus proper at this time?

In *Wallace v. Edwards,* 217 C.A. 2nd 64, it was held that:

> "Except as our jurisdiction may be invoked by Petition for an original writ, we may review judgments of the Superior Court on appeal from a small claim Court only where the case has been duly transferred to us pursuant to rules 61 to 69 of California Rules of Court."

Defendant herein has exhausted his Appeal remedies, and now seeks an *original Writ* by petitioning for the Writ prayed for herein.

In re Sterling, 235 ACA 266, the Court held that where Defendants exhausted their legal remedies with respect to the use of illegally obtained evidence to secure their conviction by appealing to the Superior Court's Appellate department and where, without a published opinion or certification to the District Court of Appeal, no further appeal was authorized under the rules (*Cal. Rules of Court,* Rule 62), a Writ of Habeas Corpus should be granted.

In the case of *In re Zerbe,* 60 C. 2nd 666, it was held that a Defendant is entitled to Habeas Corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct. In the *Zerbe* case, supra, the Superior Court, Appellate Division, certified the case. Here the question arises as to whether Defendant's conduct was prohibited by Penal Code Section 148. The Court further stated, at 60 C. 2nd 667:

> "For purposes of this Writ as well as prohibition or certiorari, the term "jurisdiction" is not limited to its fundamental meaning and in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the Court's powers as defined by constitutional provision, statute, or rules developed by Courts."

The *Sterling* case, supra, stands for the proposition that Defendant herein, although certification was refused, may seek the remedy of a Writ of Habeas Corpus in the District Court of Appeal.

In light of the *Perry* case, supra, and the *Sterling* case, supra, together with the facts of the case herein, the Writ should issue.

Respectfully submitted,
Alvin M. Cibula,
Scott & Scott,
Attorneys for Defendant.
By Jeremiah R. Scott, Jr.

Proof of Service by Mail—1013a, 2015.5 CCP

State of California
County of Humboldt—ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is 350 E Street, Eureka, California.

On February 17, 1966, I served the within Petition for Writ of Habeas Corpus and Points and Authorities in Support of Writ of Habeas Corpus on the following persons, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Eureka, California, addressed as follows:

Leonard M. Conry, District Attorney
Humboldt County Court House
825 Fifth Street
Eureka, California 95501

Honorable Charles M. Thomas
Judge of the Municipal Court
Eureka Judicial District
Humboldt County Court House
825 Fifth Street,
Eureka, California 95501

Thomas C. Lynch
Attorney General
State of California
1315 Fifth Street
Wells Fargo Bank Bldg.,
Capitol Mall
Sacramento, California

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on February 17, 1966, at Eureka, California.

Billie-Rae S. Johansen.